(21,996.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 197.

CITY OF LOUISVILLE, KENTUCKY, APPELLANT,

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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1 Proceedings of the Circuit Court of the United States for the Western District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall, in the City of Louisville, on Monday, October 11th, 1909.

Present:

Honorable Walter Evans, sitting as Circuit Judge.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,

vs.

CITY OF LOUISVILLE, KENTUCKY, Defendant.

Be it remembered that heretofore, to-wit, on the 8th day of February, 1909, came the Complainant, the Cumberland Telephone & Telegraph Company, by William L. Granbery and Fairleigh, Straus & Fairleigh, its counsel, and filed in the Clerk's office of our said court its Bill of Complaint in the above entitled cause.

The Bill of Complaint above referred to is in words and figures as follows, to-wit:

2 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky, at Louisville.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY

vs.

THE CITY OF LOUISVILLE, KENTUCKY.

To the Honorable the Judges of the Circuit Court of the United States in and for the Western District of Kentucky, sitting at Louisville:

The Cumberland Telephone & Telegraph Company, a corporation organized under and pursuant to the laws of the Commonwealth of Kentucky, and having its principal place of business in the city of Louisville, in said State, brings this, its bill of complaint, against the city of Louisville, Kentucky, a municipal corporation created and existing under and pursuant to the laws of the Commonwealth of Kentucky; and,

I.

Thereupon, your orator complains and says that on the 8th day of June, 1883, there was duly incorporated under the laws of the Commonwealth of Kentucky a corporation known as the "Cumberland Telephone & Telegraph Company;" that thereafter its charter

was amended on December 21, 1883, by increasing its capital
3 stock, and thereafter, on the 14th day of May, 1889, its charter was again amended, and on February 3, 1896, it duly and legally accepted the provisions of the present Constitution of the Commonwealth of Kentucky.

On the 8th day of June, 1883, there was incorporated under the laws of the Commonwealth of Kentucky a corporation called the "Great Southern Telephone & Telegraph Company," which, on August 16, 1897, duly and legally accepted the provisions of the present Constitution of the Commonwealth of Kentucky; and thereafter, on the 4th day of March, 1898, pursuant to the laws of the Commonwealth of Kentucky, said two corporations were duly consolidated under the name of the "Cumberland Telephone & Telegraph Company."

By an Act of the General Assembly of the Commonwealth of Kentucky, approved April 3, 1886, there was created a corporation under the name of "The Ohio Valley Telephone Company," and on January 22, 1900, The Ohio Valley Telephone Company duly and legally accepted the provisions of the present Constitution of the Commonwealth of Kentucky, known as the Constitution of 1891; and thereafter, on January 27, 1900, said The Ohio Valley Telephone Company and the Cumberland Telephone & Telegraph Company were duly and legally consolidated under the name of the "Cumberland Telephone & Telegraph Company." Said consolidated corporation had a capital stock fixed in said Articles of Consolidation at six millions of dollars, and by amendment duly made and filed on January 9, 1903, its capital stock was increased to twenty millions of dollars; and thereafter, to-wit, on the 26th day of September, 1907, its charter was further amended by increasing its capital stock to twenty million, two hundred thousand dollars, and changing its legal domicile from Hopkinsville, Christian County, Kentucky, to Louisville, Jefferson County, Kentucky.

A copy of the charters of the original Cumberland Telephone & Telegraph Company, the Great Southern Telephone & Telegraph Company and The Ohio Valley Telephone Company, together with the various amendments, and the acceptances of the present Constitution of the Commonwealth of Kentucky, is hereto at-
4 tached, but need not be copied in the issuance of process.

II.

The charter of The Ohio Valley Telephone Company, by special act of the General Assembly of the Commonwealth of Kentucky, provides in Section five that,—

"The said company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the City of Louisville, with and by the consent of the General Council of said City; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed upon, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses,

patents, or interests, therein, equipments, rights of way, easements and servitudes, in highways, streets and alleys in the City of Louisville, together with all of its properties; and, when purchased or leased, shall have the power to maintain and operate the same along, over, or under the highways, streets and alleys in the said city of Louisville; provided, however, that such telephone poles, lines, and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip, maintain telephone lines along, over, or under the highway, streets, and alleys, and across any water-course within this Commonwealth, so as not to obstruct the same; and said Company may connect its lines with those of any other Company, on such terms as may be agreed upon."

And thereafter, on August 17, 1886, there was approved an ordinance by the legislative department of the City of Louisville, by its General Council, in the words and figures as follows, to-wit:

"An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville.

"Whereas, The General Assembly of the Commonwealth of the State of Kentucky passed an act, entitled 'An Act to incorporate The Ohio Valley Telephone Company,' which was approved on the 3rd day of April, 1886, section 5 of which said Act is as follows:

"'SEC. 5. The said company may construct, equip, and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the General Council of said city; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interests therein, equipments, rights of way, easements, servitudes, in the highways, streets and alleys in the city of Louisville, together with all of its properties, and, when purchased or leased, shall have power to maintain and operate the same along, over or under the highways, streets and alleys of the city of Louisville; provided, however, that such telephone poles, lines and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said city of Louisville by the

General Council thereof. And the said company may also construct, equip and maintain telephone lines along, over or under the highways, streets and alleys, and across any water-course within this Commonwealth, so as not to obstruct the same; and said company may connect its lines with those of any other company on such terms as may be agreed on.'

"Therefore, be it ordained that the said Act, in so far as it refers to the constructing, equipping, operating and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating and maintaining conduits and manholes; to laying pipes, cables, conductors and wires, and operating telephone wires over, along or under the highways, streets and alleys in the city of Louisville, is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said The Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the City of Louisville, provided,—

"First. That the said Telephone Company, its successors and assigns, shall agree to carry on its poles, or through any underground system which it may construct, such wires or conductors as may be necessary for operating the fire and police systems of the said city of Louisville, free of charge to the said city, said wires or conductors to be furnished by the city of Louisville, and to be placed in position at the cost of said city, but under the direction of the said The Ohio Valley Telephone Company, its successors or assigns, and in such manner as not to interfere with the effective operation of the wires or conductors of said The Ohio Valley Telephone Company, its successors or assigns.

"Second. That in each and every case wherein the said The Ohio Valley Telephone Company, its successors or assigns, shall construct any underground conduit or lay any underground
6 pipes, cables, conductors or wires, in no case shall the city be liable for any injury or damage to any third party which may be caused by the putting down of said conduits, pipes, cables, conductors or wires by the said The Ohio Valley Telephone Company, its successors or assigns; and the said Telephone Company, its successors or assigns, shall protect the city and hold it harmless from any and all damages which may arise from said cause.

"Third. The said Telephone Company, its successors or assigns, shall not at any time open or encumber more of any street, avenue, alley or sidewalk than may be necessary to enable them to perform the work with proper economy and efficiency in the laying of their pipes, cables, conductors or wires, nor shall they permit such opening or encumbrance to remain for a longer period than may be necessary to do the work for which said opening shall have been made, and they shall put up and maintain about said opening and encumbrances such barriers and lights as will effectually prevent the happening of any accidents by reason of such openings or encumbrances.

"Fourth. In constructing the conduits, or in laying their pipes, cables, conductors or wires, the said Telephone Company, its successors or assigns, shall do no permanent injury to any street, avenue, alley or other public place or shade tree, nor shall they unnecessarily disturb or interfere with any sewers, water-pipes or gas pipes now laid in the city, or which may be laid at said time.

"Fifth. All said work of opening said streets, alleys, avenues and sidewalks, for the purpose of constructing a conduit, or of laying said pipes, cables, conductors or wires by the said Telephone Company, its successors or assigns, shall be done under the supervision of the City Engineer, and subject to his approval.

"Sixth. Whenever the said Telephone Company, its successors or assigns, shall open ground for the purpose of constructing a conduit, or of laying their pipes, cables, conductors or wires they shall, with all due diligence after the completion of said work, restore said streets, avenues, alleys and sidewalks so opened, or any sewer, gas pipe or water pipe located therein to a condition equally as good as when said opening was made, at their own expense, and to the satisfaction of the City Engineer; and in case of their failure or refusal to do so, the city may proceed to do the same, and the said Telephone Company, its successors or assigns, shall be liable for the cost thereof.

"Seventh. As soon as practicable after the approval of this ordinance, and before the said Telephone Company, its successors or assigns, shall be allowed to open any street, avenue, alley or sidewalk for the purposes hereinbefore stated, the said Telephone Company, its successors or assigns, shall execute a bond for the sum of $50,000.00, with good and sufficient security, in favor of the city of Louisville, conditioned that the said Telephone Company, its successors or assigns, shall hold the said city of Louisville harmless and free of all damage which may be caused by the opening of any street, avenue, alley or sidewalk for the purpose hereinbefore stated,—said bond to be renewed from time to time, with such security as the General Council may require.

7 "Eighth. Nothing in this ordinance shall be construed as to give to said Telephone Company, its successors or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors, or wires in the streets, avenues, alleys or sidewalks of the city of Louisville.

"Ninth. That (within thirty days from the passage of this ordinance) the said The Ohio Valley Telephone Company, its successors or assigns, shall formally agree, in writing, to accept the terms of the provisions of this ordinance, and file the said written copy of said agreement, and also the aforementioned bond with the Mayor of the city of Louisville, and from and after the date of said acceptance this said ordinance shall take effect and be in force as a contract between the said City of Louisville and the said The Ohio Valley Telephone Company.

CARY B. BLACKBURN, *P. B. C.*
JAS. C. GILBERT, *P. B. A.*
P. B. REED, *Mayor.*

L. R. McCLEARY, *C. B. C.*
OLIVER LUCAS, *C. B. A.*

Approved August 17, 1886."

And thereafter, at a called meeting of the directors of The Ohio Valley Telephone Company, held at its office, Room No. 9 at 444 West Jefferson Street, Louisville, Kentucky, at twelve o'clock M. August 18, 1886, a motion was unanimously adopted, accepting said ordinance, and the President was directed to prepare a good and sufficient bond for fifty thousand dollars, in compliance with Section seven of said ordinance; and the Secretary of said company was directed to deliver said bond to the Mayor of the City of Louisville, and also to notify said Mayor of the acceptance by said company, as required by Section nine of said ordinance, and to furnish him, the said Mayor, with an official copy of the proceedings of said meeting within thirty days thereafter.

And thereafter, on September 3, 1886, W. H. Newman, Secretary of The Ohio Valley Telephone Company, addressed a letter under the corporate seal of the company, to Hon. P. B. Reed, who was at that time the Mayor of the City of Louisville, in the words and figures as follows, to-wit:

8 "Office of The Ohio Valley Telephone Company,

Room No. 9, No. 444 West Jefferson St.

LOUISVILLE, KY., *September 3rd*, 1886.

Hon. P. B. Reed, Mayor of the City of Louisville.

DEAR SIR: I have the honor to officially notify you of this company's acceptance of an ordinance passed by the General Council of this city and approved August 17th, 1886, as per extract from the minutes of a meeting of the Board of Directors of The Ohio Valley Telephone Company held at the office of the Company,—Room No. 9, No. 444 West Jefferson St., in the City of Louisville, Ky., at 12 o'clock M., August 18th, 1886, to-wit:

(*Extract from Minutes.*)

'An ordinance passed by the General Council of the City of Louisville, entitled: 'An ordinance confirming and ratifying Section Five of an Act passed by the General Assembly of the Commonwealth of Kentucky and approved on the 3rd day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company;' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville.' Approved August 17th, 1886.'

'Resolved, That this Company hereby accepts the terms and provisions of said ordinance.'

"On motion, the Secretary of the Company was directed to notify you as the Mayor of the City of Louisville, of the above official action of

the Company under the official seal of said Company as their official act and deed in accepting said ordinance.

"I am further directed by the Board of Directors of this Company, as its Secretary, to deliver to you, as the Mayor of the City of Louisville, the bond of this Company for the sum of Fifty Thousand Dollars, as required by the provisions of said ordinance, and herewith have the honor to submit same for your approval and acceptance and request your official answer to this communication and enclosure of bond herewith submitted.

Very respectfully,

W. H. NEWMAN,
[SEAL.] *Secretary of The Ohio Valley Telephone Company.*

And accompanying said letter was a bond in the sum of fifty thousand dollars, in the words and figures as follows, to-wit:

9 *"Bond of the Ohio Valley Telephone Company to the City of Louisville.*

In pursuance of an ordinance of said City approved August 17th, 1886.

"Whereas, the General Council of the City of Louisville enacted an ordinance approved August 17th, 1886, entitled:

"An ordinance confirming and ratifying Section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky and approved on the 3rd day of April, 1886, and entitled 'An Act to incorporate The Ohio Valley Telephone Company;' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville."

"Which said ordinance has been accepted by the said The Ohio Valley Telephone Company as provided therein;

"And Whereas, Section Seventh of said ordinance requires that said The Ohio Valley Telephone Company shall execute a bond as specified therein; now, therefore,—

"Know all Men by These Presents: That in compliance with said Section Seventh of said ordinance, we, the said The Ohio Valley Telephone Company, as principal, and J. B. Speed and James Clark, as sureties, do hereby bind ourselves, our successors, executors, administrators, heirs and assigns, to and with the said City of Louisville, that the said The Ohio Valley Telephone Company, its successors and assigns, shall hold the said City of Louisville harmless and free of all damage which may be caused by the opening of any street, avenue, alley or sidewalk for the purpose as provided in said ordinance.

"Provided: That liability under this bond shall not exceed the sum of Fifty Thousand Dollars.

"Witness the hand and seal of said Telephone Company by its President, and the hands of said sureties at Louisville, Ky., this twenty-eighth day of August, 1886.

THE OHIO VALLEY TELEPHONE COMPANY,
By J. B. SPEED, *President.*
J. B. SPEED.
JAMES CLARK.

Approved Sept. 9th, 1886; signed by
OLIVER LUCAS,
Clerk Board of Aldermen.
L. R. McCLEARY,
Clerk Board of Council."

And thereafter, on September 4, 1886, Hon. P. B. Reed, Mayor of the City of Louisville, addressed a letter to W. H. Newman, Secretary of the Ohio Valley Telephone Company, in the words and figures as follows, to-wit:

"MAYOR'S OFFICE,
LOUISVILLE, KY., *Sept. 4th,* 1886.

W. H. Newman, Esq., Secretary of The Ohio Valley Telephone Company, Louisville, Ky.

DEAR SIR: I have the pleasure to acknowledge receipt of your letter of the 3rd inst., officially notifying me of the acceptance on the part of The Ohio Valley Telephone Company of an ordinance passed by the General Council of this city, entitled: 'An ordinance confirming and ratifying Section Five of an Act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company;' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville.' Approved August 17th, 1886.

Also to acknowledge the receipt of a bond for Fifty Thousand Dollars in favor of the City of Louisville, with your company as principal, and J. B. Speed and James Clark as sureties, in compliance with Section Seventh of said ordinance, and to notify you that the said notification of acceptance and bond will be referred to the General Council of this city for approval.

Respectfully,

P. B. REED, *Mayor.*"

From that time continuously to January 27, 1900, the said The Ohio Valley Telephone Company operated a telephone exchange in the city of Louisville, and at all times thereafter the city of Louis-

ville and its officials recognized The Ohio Valley Telephone Company as legally and lawfully occupying the streets, alleys and public places of said city of Louisville, with its poles, wires, cables, conduits and other apparatus and structures under and pursuant to its said charter hereinabove set out and said ordinance and official acceptance and ratification thereof, and, upon the consolidation of The Ohio Valley Telephone Company and the Cumberland Telephone & Telegraph Company, on January 27, 1900, the consoli-
11 dated company, under the name of the "Cumberland Telephone & Telegraph Company," has continuously to the present time, and is now, occupying the streets, alleys and public places of the City of Louisville with its poles, wires, cables, conduits and other apparatus and structures, and has continuously to the present time, and is now, engaged in operating a telephone exchange or plant under the name of the Cumberland Telephone & Telegraph Company, and the City of Louisville has officially and otherwise, at all times, until January, 1909, recognized said company as lawfully and legally occupying the streets, alleys and public places with its structures, and operating a telephone plant in said city.

On April 7, 1902, the City of Louisville, through its General Council, adopted an ordinance entitled, "An ordinance requiring the Cumberland Telephone & Telegraph Company to execute bond as required by Section seven of the ordinance relating to the rights and duties of the Ohio Valley Telephone Company, its successors and assigns, approved August 17, 1886,"—and in accordance with said ordinance the Cumberland Telephone & Telegraph Company, your orator herein, executed a bond, with the American Bonding & Trust Company as its surety in the penal sum of fifty thousand dollars, payable to the City of Louisville, which bond was in the words and figures as follows, to-wit:

"Bond of the Cumberland Telephone and Telegraph Company, Successor of the Ohio Valley Telephone Company.

"In pursuance of an ordinance of the City of Louisville, approved April 7th, 1902, entitled 'An ordinance requiring the Cumberland Telephone & Telegraph Company to execute bond as required by section seven of the ordinance relating to the rights and duties of the Ohio Valley Telephone Company, its successors and assigns, approved August 17th, 1886.'

"We, the undersigned, Cumberland Telephone & Telegraph Company, a corporation organized and existing under the laws of the State of Kentucky, successor of the Ohio Valley Telephone Company, as principal, and the American Bonding and Trust
12 Company, of Baltimore City, a corporation organized under and existing under the laws of the State of Maryland, and authorized to do business in the State of Kentucky, as surety, do hereby bind and obligate ourselves, our successors and assigns, in the sum of fifty thousand dollars ($50,000.00), to and with the city of Louisville, State of Kentucky, that the said Cumberland Telepone & Telegraph Company, its successor- and assigns shall hold

the said city of Louisville harmless and free from all damage which may be caused by the opening of any street, avenue, alley or sidewalk for the purpose as provided in said ordinance of August 17th, 1886.

"It is understood and agreed, however, that this bond is executed to cover a term of five (5) years only, but is renewable at the option of the surety herein named.

"In witness whereof, we have herewith affixed our signatures under our respective corporate seals, this first day of May, 1902.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President.*

Attest:

LELAND HUME,
[SEAL.] *Secretary.*

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By ERNEST HOEN, JR., *2nd Vice-President.*

Attest:

EDWIN W. POE,
[SEAL.] *Assistant Secretary.*

And thereafter, on June 7, 1902, the General Council of the City of Louisville passed a resolution, in the following words and figures, to-wit:

"Resolved by the General Council of the City of Louisville: That the foregoing bond of the Cumberland Telephone & Telegraph Company, successors of the Ohio Valley Telephone Company, principal, and the American Bonding and Trust Company, of Baltimore City, as surety, be, and the same is hereby, accepted and approved, and the said Ohio Valley Telephone Company, together with its sureties, J. B. Speed and James Clark, are hereby released from all liability under their bond to the City of Louisville, dated August 28th, 1886, and approved September 9th, 1886.

CHAS. C. MARTIN, *C. B. C.*
D. W. PARKHILL, *C. B. A.*
F. J. HUMMEL, *P. B. C.*
PAUL B. BARTH, *P. B. A. P. T.*

Approved June 7, 1902.

CHARLES F. GRAINGER,
Mayor."

13 And from time to time since June 7, 1902, your orator, the Cumberland Telephone & Telegraph Company, has renewed said bond in favor of the City of Louisville, as often as requested so to do by the proper authorities of said city.

III.

On January 22, 1909, the General Council of the City of Louisville adopted an ordinance, which, on January 23rd, was adopted by the Board of Councilmen, and on the same day approved by the Mayor of the City of Louisville in the following language, to-wit:

"An ordinance repealing an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville," approved August 17, 1886.

"Be it ordained by the General Council of the City of Louisville:

"SECTION 1. That an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville,'—approved August 17, 1886, be, and the same is, hereby repealed.

SEC. 2. This ordinance shall take effect from and after its passage.

(Passed by the General Council January 22, 1909.

Passed by the Board of Councilmen January 23, 1909.

Approved by the Mayor on January 23, 1909.)"

And said city authorities and the defendant, the City of Louisville, are now insisting that by virtue of said ordinance last
14 above mentioned that your orator is without right to occupy the streets, alleys and public places in said City of Louisville with its poles, wires, conduits and other structures, and is unlawfully and illegally conducting a telephone business and operating an exchange in said city. Your orator charges that said ordinance was passed without any notice whatever to your orator of the intention of the City of Louisville to adopt the same, and it was adopted without any just cause, or without assigning any just cause therefor, and over your orator's protest.

On the 8th day of February, 1909, your orator instituted suit in the Circuit Court of the United States for the Western District of Kentucky, at Louisville, against the City of Louisville, seeking to

restrain the enforcement of said ordinance, and charging that the action of the city authorities impaired the obligation of your orator's contract with the said City of Louisville, in violation of Section ten of Article two of the Constitution of the United States, and that said city was seeking to deprive your orator of its property without due process of law, and was denying to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV.

Your orator further states that on February 27, 1909, the City of Louisville, through its legislative department, adopted an ordinance entitled, "An ordinance fixing the maximum rates to be charged for telephone service in the City of Louisville." Said ordinance was approved by the Mayor on the 6th day of March, 1909, and is in the words and figures as follows, to-wit:

"An Ordinance Fixing the Maximum Rates to be Charged for Telephone Service in the City of Louisville.

"Be it ordained by the General Council of the City of Louisville:

"SECTION 1. That no company, corporation or individual operating, conducting, maintaining a telephone system, or furnishing telephone service in the city of Louisville, shall charge more for such service than the following rates which are hereby fixed, established and ordained to be the maximum rates that may be charged for telephone service in the city of Louisville.

"SECTION 2. For each telephone in a business house or office the maximum rate of charge shall not exceed,

For a single or private line, unlimited service, $5.50 per month, or at the rate of $66.00 per year.

For a party line, unlimited service, $4.00 per month, or at the rate of $48.00 per year.

For each telephone in a residence the maximum rate or charge shall not exceed:

For a single or private line, unlimited service, $3.00 per month, or at the rate of $36.00 per year;

For a party line, unlimited service, $2.00 per month, or at the rate of $24.00 per year.

For each extension desk telephone the maximum rate or charge shall not exceed $1.00 per month, or at the rate of $12.00 per year.

"SECTION 3. Any person, firm or corporation violating any provision of this ordinance, or charging a higher rate for telephone service than is fixed by this ordinance, shall be subject to a fine of not less than $5.00, nor more than $25.00 for each offense. Each charge for telephone service in excess of the rates herein fixed, and each month that such charge is made for such service, shall constitute a separate offense.

"SECTION 4. That an ordinance entitled 'An Ordinance regulating the charges for telephone service in the city of Louisville,' ap-

proved November 12, 1906, is hereby repealed: provided, however, that this ordinance shall not be so construed as to confer upon any person, firm or corporation now conducting or operating a telephone system in the city of Louisville the right to charge any rate in excess of that limited in the charter or franchise of such person, firm or corporation.

"SECTION 5. This ordinance shall take effect from and after its passage."

The ordinance referred to in Section Four of said ordinance provided that maximum telephone rates in the city of Louisville should be $1.00 per month for a business telephone and $2.00 per month for a residence telephone. Soon after the passage of this ordinance, your orator instituted suit in the United States Circuit Court for the Western District of Kentucky, at Louisville, seeking to en-
16 join the enforcement of said ordinance; a temporary injunction was granted, and no answer has since that time been filed by the City of Louisville, and said ordinance has never been attempted to be enforced against your orator.

The latter part of Section Four of said ordinance above set out was intended to prevent any increase in rates by the Louisville Home Telephone Company, a corporation conducting a telephone business in the City of Louisville under a contract with the City of Louisville limiting its rates to less than the maximum rates provided in said ordinance hereinabove set out; and your orator charges that said ordinance was intended to apply exclusively and alone to your orator, since it is the only other telephone company either engaged in the telephone business in said city, or authorized to engage in such business in said city.

V.

Your orator further charges that its telephone plant in the City of Louisville and its immediate suburbs, which is a part of the exchange and cannot be disconnected or disassociated from that part of the exchange located within the corporate limits of the City of Louisville, cost your orator, to January 1, 1909, the sum of $1,700,045.26; that the number of subscribers to said exchange on January 1, 1909, was 9,657; that its revenue derived from said exchange for the year 1908 was as follows:

Exchange service	$311,112.63	
Proportion of tolls earned by Exchange	7,728.08	
Messenger service	655.02	
Directory Advertisements	3,181.15	
Miscellaneous	2,926.66	
		$325,603.54

17 And the expense of conducting the business for the same period was as follows:

General:		
Proportion General	$10,707.42	
Legal	3,951.00	
Uncollectible Accounts	3,707.34	
Operating:		
Salaries and Wages	57,344.40	
Rent, Light and Heat	13,271.84	
Postage, P'f'g and Stationery	4,443.82	
Directory	4,754.76	
Advertising and Canvassing	5,711.13	
Messenger Expense	727.94	
Incidental	2,565.87	
Maintenance:		
Salaries and Wages	55,748.09	
Rent, Light and Heat	2,967.27	
Material	13,508.37	
Traveling	7,929.48	
Incidental	252.98	
Reserve for Deferred Maintenance	12,214.82	
Taxes	19,563.85	
Instrument Rental	14,181.00	
Pole and Bridge Rental	630.18	
Insurance	3,583.11	
Damage and Compensation	1,945.81	
Total Expenses		$239,710.48

Your orator further charges that the per cent of net revenue to cost of the plant was 5.11%, which does not include any depreciation upon the plant, and if the rates prescribed by said ordinance are put into effect, it will result in a decrease in your orator's revenue, based upon the present rates and its present subscribers located inside the corporate limits of the City of Louisville, amounting to $33,504.00, and at the same time it will not decrease in any respect the expense of conducting said business. In other words, your orator charges that if the rates prescribed in said ordinance had been in effect during the year 1908, and the number of its subscribers had been the same at the new rates that they were at the rates that your orator charged, its gross revenue would have been $33,504.00 less than it was, and its expense would not
18 have decreased at all, leaving an apparent net profit to your orator on its investment of more than one million, seven hundred thousand dollars of 3.08 per cent; and your orator charges that said rates prescribed in said ordinance are confiscatory, and, if enforced, will require your orator to operate its plant in Louisville without just compensation, and will take your orator's property without due process of law.

VI.

Your orator further states that in addition to the exchange in the City of Louisville it owns and operates exchanges in Jefferson County, Kentucky, at Anchorage, Harrod's Creek, Jeffersontown, Pleasure Ridge Park and St. Matthews, and that it owns and operates telephone exchanges in Jeffersonville and New Albany, Indiana, and other places throughout the country.

Its exchanges are constructed by erecting at a central point in each city a building in which is located a switchboard, and from this board lines of small wire are erected upon poles or in conduits to the business houses or residences of each subscriber, and there connected with the telephone instrument. In this way each subscriber can signal an operator at the central office and receive connection with any other subscriber. For this character of service a monthly rental is paid, which entitled the subscriber to receive unlimited service from the local exchange.

In the same manner the toll lines are brought into the city attached to the same poles, and connected to the switchboard, and each subscriber to the local exchange is entitled to signal the operator at the exchange and receive connection over the toll lines of your orator to all other cities and places where its exchanges or lines are located, and there be connected with any other of your orator's subscribers, who, on January 1, 1909, numbered 187,259.

19 The charge for this character of service, generally speaking, — one half of one per cent per air mile between the two cities thus connected for each three minutes of conversation, and one third the initial charge for each additional minute of conversation. This is the exact rate charged non-subscribers who *who* the toll lines from the central office.

In the City of Louisville your orator has erected four exchanges, called "Main," "West," "East," and "South." These exchanges are so arranged that any two subscribers in the City of Louisville can be at once put into communication. In addition to the four exchanges in the City of Louisville, all of which are considered and treated as one exchange, for its patrons in said city, your orator has erected and operates in Jefferson County, Kentucky, exchanges at Anchorage, Harrod's Creek, Jeffersontown, Pleasure Ridge Park and St. Matthews. It also has erected, owns and operates exchanges in Jeffersonville and New Albany, Indiana. The telephone patrons of the City of Louisville have access to, without additional charge or compensation, and the right to communicate with and hold conversation with any of your orator's subscribers in Jeffersonville, numbering 1,288, and New Albany, numbering 727, and with those to the other exchanges in Jefferson County, Kentucky, paying for and entitled to receive Louisville service as follows:

Anchorage, 42; Harrod's Creek, 42; Jeffersontown, 36; Pleasure Ridge Park, 41, and St. Matthews, 63.

Your orator further states that on January 1, 1909, the number of its subscribers to the Louisville Exchange was 9,657; any one of these subscribers had the right to unlimited connection with any one or more of the other subscribers upon the payment of the

monthly charge; and, in addition thereto, had access to and free communication with said subscribers to the various smaller exchanges in Jefferson County, and to all of your orator's subscribers in Jeffersonville and New Albany, Indiana, as hereinabove set out.

20 Its rates for service in the City of Louisville, as hereinabove explained, were, from March 1, 1907, and are now, the following:

Business.

Within the Two-mile Radius of Nearest Exchange.

Private metallic	$8.00 per month
2-station metallic	5.00 per month.
Public pay station (Coin device) Private	4.00 per month.

(Agent's service free out and in, and divide with any cash deposits for local city calls):

City and County telephones within city limits	4.00 per month.

Residence.

Private, within city limits	4.00 per month.
Private, beyond city limits and within three miles of nearest exchange	4.50 per month.
2-station, within city limits	3.00 per month.
2-station, beyond city limits and within three miles of nearest exchange	3.50 per month.
Extension set	1.25 per month.

Country Rates.

Private Metallic—Business *of* residence—add to the exchange radial rate 50c. per month, per mile, or fraction thereof, if subscribers are located beyond the exchange radius. Exchange radius for business is 2 miles; for residence, 3 miles, from nearest Louisville Exchange.

4-Party Metallic—Business or residence—add to the exchange radial rate 25c. per month, per mile, or fraction thereof, if the subscriber is located beyond the exchange radius. For exchange radius see above.

21 Extension set ..... $1.25 per month.

A discount of 50 cents per month is allowed on all rates above enumerated if rental is paid quarterly in advance.

Private line instruments, $12.00 per year, per instrument, to which is added mileage charge of $30.00 per mile, per annum.

Extension Bells—(Business or residence) net	$0.15 per month.
Joint User (Business) net	1.00 per month.
List (Business) net	.25 per month.
List (Residence) net	.25 per month.
Loud Ringing extension gongs—net	.25 per month.
Buzzers and Push Buttons—net	.25 per month.

These rates were in effect during the whole of 1908, and on January 1, 1909, your orator had 738 patrons paying in the Louisville exchange the $8.00 business rate, and 875 paying the $4.00 residence rate. All the remainder of your orator's patrons in the Louisville exchange had some other kind of service at the various rates hereinabove set out for business and residence purposes.

Your orator charges that over and above the ordinary and necessary expenses of maintaining said exchange and structure, there is, of necessity, a depreciation or deterioration of said plant which cannot be taken care of as it occurs, but must be provided for out of the receipts of the exchange, so as to provide a fund with which to take care of this decay and depreciation when the various pieces of property comprising the exchange can no longer be used and have to be replaced with new material; that the switch-board, however carefully it may be maintained and operated, will, in the process of time, become so worn and decayed as to necessitate its replacement with a new one. In like manner, the poles, wires, cables and all of the various and many items of property entering into a telephone exchange, must, from time to time, be replaced and renewed after they have served their usefulness; and
22 this renewal is in addition to and beyond the mere current repairs required to maintain the plant in an operating condition.

23 This depreciation must, of necessity, be provided for out of the receipts, year by year, and in order to do this properly your orator, of necessity, is required to take from its gross receipts each year seven and one-half per cent of the actual cost of the plant, with which to provide a proper, reasonable and just depreciation fund, less whatever amount has been expended during that particular year on re-constructing parts of the plant, so that, at the end of each year, before any part of its receipts can be considered profit, there must be deducted seven and one-half per cent of the actual cost of the plant, less whatever amount has been expended during that year on re-constructing the plant. For this reason, the annual amount set aside for depreciation varies, year by year, according as a larger or less amount may have been expended in re-constructing parts of the plant during that year.

VII.

On January 1, 1907, your orator adopted a schedule of charges for telephone service in the city of Louisville, hereinbefore set out, which was somewhat higher, in some respects, than the rates theretofore in force. This action of your orator resulted in a protest from the Board of Trade of the City of Louisville against the charges that your orator was proposing to make, and resolutions were adopted, copies of which were furnished your orator by direction of the Board of Directors of the Board of Trade. A reply thereto was made by your orator's president, under date of March 6, 1907, as follows:

"Mr. James F. Buckner, Jr., Superintendent Louisville Board of Trade, Louisville, Ky.

My Dear Sir: Your letter of February 27th, addressed to our Superintendent, Mr. George G. Hall, of your city, together with a copy of the resolutions adopted by your Board of Directors, has been referred to this office, and in reply thereto, I have to say, that on a former occasion we endeavored to give your body a full, complete and truthful statement of the conditions confronting us and connected with our business in your city.

I do not understand from your resolutions that you dispute the facts we presented, or challenge the correctness of our conclusion, but, that you conclude that in view of the fact that another
24 telephone company is operating in your city; 'furnishing,' as you say, 'nearly a similar service to about the same number of patrons at from one-half to two-thirds of the rates charged by us;' that you find similar conditions existing in other cities, and therefore you conclude that we are not warranted in making the charge for our service that we are, but that, on the contrary, the conditions set forth by you should justify us in doing likewise.

As business men I am quite sure that you do not follow this course of reasoning or procedure in your own affairs; you do not price your best and most valuable wares in competition with cheap and inferior wares, nor do you indeed sell your goods at less than cost simply because some rival sees fit to do so, but the whole history of commerce is to the effect that prudent people have always permitted their rivals, who are so foolish as to sell goods below cost, to do so until they are bankrupted and exhausted, and this is precisely our attitude in the matter.

This company is not organized for the purpose of exploiting a stock and bond scheme, but for the sole purpose of meeting the fair, legitimate and proper demands for a telephone service, and paying a proper, fair and legitimate return upon the actual money employed in giving the service. There is not one dollar of inflation or water in the securities of this company, and it is only seeking, and is actually only paying a decent and reasonable return upon the actual cash money that has been invested in the property, wherewith to serve you. This is all that it expects to derive, and this it certainly feels that it is justly entitled to and that it has a perfect right to claim and to strive to get.

We offer you every facility and opportunity for certifying the statements which we made to you, and we respectfully submit that unless it is demonstrated that our business is conducted in an extravagant, reckless and improper manner that we should not be asked to make any less price, but, on the contrary, if it is demonstrated that it is run with prudence and economy and no inflation or return on any capital except that which is absolutely necessary to carry on the business, then there should be no criticism whatever, but, on the contrary, we should be encouraged and our action approved.

Permit me to state deliberately and emphatically that, no matter what may be said, it is fact that this company is conducting its

entire business along the closest and most economical lines, is capitalized on the very lowest possible basis, and is not guilty of one single, solitary thing that is being promiscuously and indiscriminately charged so freely about corporations generally with regard to stock and bond jobbing, watering, inflation, etc., and it invites a most searching inquiry into and verification of these facts.

I beg to assure you that we regret exceedingly to find ourselves in the least at variance with your Board. We have made a sincere and earnest effort to develop the telephone business in your entire section of the country, to afford you facilities which should enable you to conduct your business with greater ease and economy; we are still striving along these lines, and we confidently hoped and expected that by so doing we would challenge your approbation and merit your confidence and esteem. We know full well that if you would take the trouble to acquaint yourselves fully and completely with all the facts connected with this business that you would vindicate us promptly and completely.

Yours very truly, JAMES E. CALDWELL,
President."

25 Following this correspondence, a personal meeting was held between the Board of Trade and the representatives of your orator, which resulted in a contract being entered into on the 18th day of April, 1907, as follows:

"Whereas, The Board of Trade of the city of Louisville, Kentucky, through its Board of Directors, has taken up the question of telephone rates to be charged by the Cumberland Telephone & Telegraph Company in the city of Louisville, and,

Whereas, It is the desire of both the Board of Trade and the Telephone Company that the rates charged shall be fair and reasonable, and shall be adjusted in accordance with proper business principles;

Therefore it is mutually agreed as follows:

First. The Board of Trade, through its Board of Directors, has appointed a committee of citizens, consisting of George Gaulbert, Attilla Cox, William R. Belknap, Marion E. Taylor, and Logan C. Murray, who, acting as a committee representing the Board of Trade of the City of Louisville, and the Cumberland Telephone & Telegraph Company, shall investigate fully the facts and determine what shall be reasonable and fair rates to be charged telephone users in the City of Louisville by the Cumberland Telephone & Telegraph Company, for a period of three years, beginning the first day of July, 1907; and at the end of this period, at the instance of either the Board of Trade of the City of Louisville, or the Cumberland Telephone & Telegraph Company, another committee of five shall be selected in like manner, who shall determine the rates to be charged for another three years, under like conditions and terms as specified in this contract.

"Second. The Cumberland Telephone & Telegraph Company, hereby binds itself to abide by the report of said committee and agrees to put into effect on the first day of July whatever rates said committee shall determine to be fair and equitable, both to the

company and its patrons; and maintain the same for a period of three years; and the Cumberland Telephone & Telegraph Company further agrees and binds itself in the event the rates determined by said committee shall be less than the rates now charged, to refund to its patrons all amounts it may have collected between January 1st and July 1, 1907, from its patrons in excess of the rates in force on March 31, 1907. And the Directors of the Board of Trade hereby obligate themselves to abide by and recommend whatever rates said committee shall determine to be fair and equitable and agree to use their influence to protect said rates in all reasonable and proper ways during said period of three years.

"Third. The Cumberland Telephone & Telegraph Company further agrees that it will afford to said committee all the assistance desired by it in determining what rates shall be charged; and to this end, agreed that all of its books, accounts, vouchers, receipts and other papers shall be freely exhibited to said committee or its representatives, and agrees that no fact or paper of any kind or description in its possession, or under its control, shall be withheld from said committee; but, on the contrary, shall be exhibited to said committee or its representatives at all times during the investigation to be made by said committee.

26 "And it is further agreed that all reasonable and proper opportunity shall be afforded said committee to make its investigation, and the company to submit facts and arguments and full opportunity shall be given to both parties to fully investigate any fact or circumstance that may be developed and which either party may wish to verify or explain,—it being the purpose and intention of this agreement to avoid all technicalities and to ascertain the real truth in justice both to the company and its patrons.

"In witness whereof, this agreement has been signed on this, the 18th day of April, 1907, by the president of the Board of Trade of the city of Louisville, Kentucky, for the Directors of said Board of Trade; and by the president of the Cumberland Telephone & Telegraph Company, for and on its behalf.

THE BOARD OF TRADE OF LOUISVILLE, KENTUCKY,
By W. W. HITE, *President.*
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President.*"

Thereafter, on August 16, 1907, the committee appointed by the Directors of the Louisville Board of Trade, made a report as follows:

"LOUISVILLE, KY., *Aug. 16th,* 1907.

To the President and Directors, Louisville Board of Trade.

GENTLEMEN: The undersigned, a special committee appointed by the Board of Trade and accepted by the Cumberland Telephone & Telegraph Company as a committee to investigate as to what constitutes a fair and reasonable rate for the Cumberland Telephone & Telegraph Company to charge for its service in the city of Louisville, now beg to report:

1st. After considering the subject carefully and ascertaining all the facts bearing on it which could be ascertained from trust-worthy sources, notably by sixteen meetings held *held* at Board of Trade rooms, beginning April 3rd, by frequent personal conferences with the officers and more expert employés of the Cumberland Telephone & Telegraph Company, and by a thorough examination of the books and accounts of said Cumberland Telephone & Telegraph Company, at the hands of an expert accountant, selected by the committee, viz: W. J. Munster of Cincinnati, we find that the average net yield to said Cumberland Telephone & Telegraph Company from its investment in the City of Louisville, since it acquired ownership of the Louisville property seven years ago, has been but 4.14 per-cent, per annum.

2nd. That the rates for telephone service in the city of Louisville *por*posed to — put into effect by said Cumberland Telephone & Telegraph Company March 1, 1907, are proper and reasonable, because they will not yield to said Cumberland Telephone & Telegraph Company more than a fair and equitable return on its investments in the city of Louisville.

3rd. The Committee further declares that the rate or rates for the various classes of telephone service in the city of Louisville put into effect by said Cumberland Telephone & Telegraph Company March 1, 1907, should be maintained as a rate for such service for the three years beginning July 1, 1907.

27 "This report is predicated onthe promise and agreement of the company to give the best possible service to its subscribers and to furnish them at all times with the most approved devices and appliances for the transmission of messages.

Respectfully submitted,

MARION E. TAYLOR, *Chairman.*
WILLIAM R. BELKNAP.
ATTILLA COX.
GEORGE GAULBERT.
LOGAN C. MURRAY."

And thereafter, in November, 1908, another committee was appointed by the Board of Directors of the Board of Trade of Louisville, to ascertain whether or not your orator was in fact charging the rates provided in said schedule, hereinabove set out, and that committee made a report as follows:

"LOUISVILLE, KY., *Dec.* 16, 1908.

President and Directors Louisville Board of Trade:

GENTLEMEN: The special committee provided for by resolution of the Board of Directors, August 26, 1908, to make investigation as to the complaint of Mr. C. M. Bullitt that the Cumberland Telephone & Telegraph Company was unfairly raising its rates for service in this city, and was discriminating in rates amongst its patrons, etc., have to report that they have carefully made inquiry as to the facts and have failed to find a single instance in which said telephone company has charged a rate for any of the various classes of

telephone service other than was determined by the old committee of the Board of Trade, (which agreement was to determine the rate for a term of three years) in its report submitted to the Board of Directors of the Board of Trade September 4, 1907, nor have we found any discrimination as between patrons except that the increase in rates allowed by the old committee was not made by the telephone company to apply to all patrons at the same time, for the reason, as stated by the company, that there were outstanding contracts between the company and its patrons which expired at different times, and for the further reason that it was not feasible for the company to at once so alter its rules as to make the new rates apply to all patrons at the same time.

In regard to whether the rates determined upon by the old committee, under the agreement between the Board of Directors and the Cumberland Telephone & Telegraph Company in April, 1907, are fair and reasonable, your committee have only to say that the old committee appears to have made a most thorough investigation of the whole subject, their inquiry extending through five months, during which time they held sixteen meetings; had before them for interrogation officers and employés of the Telephone Company, and others, and the assistance of a high-grade, expert accountant employed by the committee, and we have nothing before us on which we can base an opinion that the old committee erred in its conclusion.

Your committee desires to call your attention to the fact that under the agreement with the Telephone Company, the rates fixed by the old committee were to stand for three years from July 1, 1907, and that about one-half of that time has now expired. If at the expiration of the full period of three years it is found that the profits of the Telephone Company, after careful and economical conducting of its business, have been greater than should be allowed, the rates and charges for the future can be intelligently adjusted.

28 We ask that this report be received and filed and that the committee be discharged.

Respectfully submitted,

MARION E. TAYLOR, *Chairman.*
WILLIAM R. BELKNAP.
LOGAN C. MURRAY.
HARDY BURTON.
CHARLES EARL CURRIE."

On December 30, 1908, the following resolution was adopted by the Board of Trade:

"That the Board of Trade disapprove the action of the Board of Directors in respect to the matter of the rates of the Cumberland Telephone & Telegraph Company, and request the Board of Directors so to advise the Cumberland Telephone & Telegraph Company."

A copy of this resolution was furnished the Mayor of the city of Louisville, and thereupon said agreement with the Louisville Board of Trade was rescinded.

Your orator further charges that there are about 410 members of the Board of Trade, including partnerships and other associations, and that there are more than 1,000 persons entitled to vote by reason of their connection with such partnerships and other concerns; that at the meeting at which the resolution of December 30, 1908, was adopted, there was present 106 members, and of this number 26 voted for said resolution and 19 against the same,—the others present not taking any part. It was stated by one member at that meeting that the committee appointed by the Louisville Board of Trade, who had investigated and approved the schedule of rates of your orator hereinabove set out as being fair, just and reasonable rates for exchange service in the city of Louisville, had been mislead and deceived by your orator in their investigation of its affairs. Your orator charges that there was no foundation whatever for this statement, and that it was entirely untrue; and, your orator further states that the members of said committee were men of the highest character and among the most prominent business men of the city of Louisville, who were not only competent to make the investigation, but who could not be imposed upon, if your orator had attempted to do so.

29

VIII.

Your orator further charges that there is now and has been in the city of Louisville since about 1901 another telephone company, operating a telephone exchange in said city; that its maximum rates are, for business purposes, $4.00, and for residence purposes, $2.50 per month; that it has a large number of subscribers and is actively seeking relief from a provision in its contract with the city of Louisville, prohibiting it from increasing its rates without permission of the city authorities. Its officers have publicly stated that its rates are ruinously low and that it is unable to care for its plant and operate the same upon the rates fixed in its contract with the city. The question of telephone- has, in this way, been brought to the attention of the public and has created and occasioned a great deal of discussion both among the citizens and the various business organizations, and the newspapers published in the city of Louisville; and your orator verily believes and charges that many statements are made with respect to the telephone business in Louisville which are wholly untrue and are entirely misleading, but which have resulted — inflaming the public mind, resulting in the action of the city officials in undertaking to destroy your orator's right to conduct a telephone business in said city and to cause it to operate its large investment in said city without just compensation.

Your orator further charges that the telephone business is inherently and essentially different from all other known kinds of business. The plant of necessity can never in the nature of things be a finished or completed property. Each new customer requires separate and distinct apparatus, separate and distinct wires to be run from the nearest switchboard to his office or residence and there connected to a separate and distinct telephone instrument. Separate and distinct wiring and a place on the switchboard is necessary for

this accommodation and the switchboard must then be connected in such a way that any of the existing subscribers may at once be put into connection with his telephone. This necessitates a
30 continued and constant expenditure of new capital, and as the number of patrons increase, the capital invested must correspondingly increase; nor can the wires formerly serving one patron often be used to serve new patrons, for the reason that the loss of a patron is usually at a different place in the city from the residence of office of the new patron, so that it results in the nature of the business that many wires after being used by patrons but a short time, when they discontinue their patronage cannot be used by new patrons, but new wires must be strung to serve such new patrons.

So long as your orator continues to serve its patrons in the city of Louisville, it must of necessity continue to invest new capital, day by day, month by month, and year by year, and must of necessity continue to string new wires, add to its switchboard capacity and connect up these new subscribers with its old subscribers.

Your orator further charges that it is impossible to conduct a telephone business in a city the size of Louisville without making provision for the future growth of the business in advance of securing additional patrons, in view of the fact that it takes usually at least one year to install the new equipment, and provide for probable increase in subscribers before the same can be used in furnishing service to such new subscribers; and therefore, it is essential, proper and prudent that your orator provide in advance for anticipated patronage, so that there will at all times be proper facilities for whatever new patronage may be secured, instead of first securing the patronage and then providing the facilities. And your orator charges that this is not only correct and proper, but that it is essential to the convenience and necessities of the telephone users in a city. Your orator charges that it has pursued this policy in good faith and of necessity and additional cost of these facilities must be added to the cost of the exchange and the depreciation on the facilities must of necessity be added to the capital and expense account of conducting the business.

31 And your orator charges that it has, and is now, conducting the telephone business in the City of Louisville as prudently, economically and honestly as the ability of its management will permit, and the rates charged by your orator in Louisville are less than the value of the service rendered, and do not afford your orator a reasonable or fair return upon the actual investment, or the actual value of its plant used in giving its patrons service; and, of necessity, your orator is compelled to conduct its business in Louisville in such a way as will prevent the expense of giving the service necessitating too high a rate, even though it does not yield a fair return upon the investment, for the reason that when the rates are beyond what your orator's patrons conceive to be a reasonable price, they decline to take the service; and therefore, the paramount duty upon the management of your orator's property is to practice every possible economy and make the rates to its subscribers as low as it is possible, and in this way alone can the telephone be continued

what it is now commonly called, "a necessity," both to business and residence.

Your orator charges that its affairs and business has, from the beginning, been conducted honestly, prudently, skillfully and economically; that from time to time serious controversies have arisen with respect to its rates and charges; that it, at all times, and now, not only is willing to, but invites a most searching investigation of its affairs and its business, of its capitalization, of its management and of its charges to its patrons. It believes and charges that its business in Louisville has been misrepresented and is wholly misunderstood, and that a full and fair investigation is all that is needed to satisfy its patrons as to the reasonableness of its rates and charges, and that its rates and charges cannot be reduced without ruin to its stockholders and disaster to its patrons who have come to rely upon your orator's service, and especially its patrons in Louisville, who not only use, but require your orator's facilities in conducting their business, since your orator's toll lines
32 and exchanges cover practically the entire trade area of the City of Louisville, and this development has been made by your orator from time to time with the greatest energy, zeal and ability at the request of its patrons in Louisville who realize the enormous value that would result to them from this development, and your orator made its investment in the full belief that its efforts would be appreciated and would receive the commendation of the business interests of the City of Louisville.

IX.

Your orator charges that no intelligent investigation of its business, or its rates, was had by the city authorities of the city of Louisville before the passage of said ordinance reducing its rates as hereinabove set out. It is true that investigation was made as to the rates charged in some other cities throughout the United States, but your orator charges that such comparison of rates in other cities is not only unjust to your orator, but is misleading. There are no two cities in the United States where conditions are sufficiently similar to warrant such comparison, and it is a fact beyond dispute that the question of telephone rates is purely and essentially a local one, and it is controlled by the four factors of cost of plant, cost of operation and maintenance, amount of taxes and dues paid the city, and the rapidity of depreciation due to climatic conditions and other causes. The price of labor, the cost of material, the conditions surrounding the business, the extent of the apparatus, the length of the wires, the height of the poles, the area of the city, and various other causes make it essentially a local question to be determined exclusively and alone by the experience of the business in that particular city, or the estimate of expert engineers as to the probable cost of building and operating the plant. The extent of the services, its character and other considerations render such comparison entirely useless.

33 Your orator further charges that said rate ordinance provides that any and every user of a business telephone in the

City of Louisville may have the same at, not exceeding $4.00 per month, and that each and every person using a residence telephone may have the same at, not exceeding, $2.00 per month. It is true that your orator has the right to charge such of its patrons as are willing to pay therefor $5.50 for a business telephone and $3.00 for a residence telephone, but there is nothing compelling any one or more of your orator's patrons to pay a rate exceeding $4.00 for business and $2.00 for residence telephones; and, if it should result that the whole of your orator's patrons should elect, as they have the right to do, to take the lower rates, your orator would be compelled to operate said plant at a heavy loss each year, until it resulted in bankruptcy.

Your orator charges that the greatest decrease in the rates prescribed over those now in effect is to those patrons best able to pay a fair price, and who have the least cause for complaint at the present rates that your orator is charging. The residence and business class now paying the so-called maximum rates of your orator are each less than 900, and these users, of course, are the heavy users of telephone service in the city, and make use of your orator's telephone facilities in their business and social affairs to a much greater extent than other patrons your orator has who pay a lower rate, and, while said ordinance provides for a slight reduction in the price charged by your orator to those using the cheaper class of service, there is a very heavy decrease in the price to be paid by the heaviest and most frequent users of your orator's service in said city.

Your orator further charges that the underlying and fundamental nature and necessity of the telephone business is to place it within reach of everyone,—for its use and value is measured by the extent of connections and development, and, therefore, rates must be classified with this object in view, namely, to reach the multitudes,

but at the same time to be able to accommodate the special
34 and private wishes of the exceptional classes who may desire private, exclusive and peculiar forms of service and equipment. In the beginning of the business there was a flat rate for business and a flat rate for residence telephones, without any party lines, or other character of service, and the result was, that but a few desired to use the service or patronize the company, so that the service was restricted and limited to the big heavy users, since all other classes of people in the community or city were unwilling to pay that price for telephone service; but experience in the business taught the management of the operating companies that in order to make the service general and of general use, it was necessary that different classes of service be provided, so as to be able to reach every class of people in the area of the exchange, and when this was worked out and applied it resulted in an enormous increase in the number of patrons and resulted in a corresponding increase in the value of the service, especially to that class who had been using the service, in, that it brought into their reach a large number of patrons whom they had not been able to reach formerly, and, in this way, it made a telephone exchange of great value to a city and

its inhabitants and resulted in offering to each patron greater advantages in the use of the service.

Your orator further charges that it is necessary and essential, not only for the welfare of your orator and its stockholders, but also of its patrons, and the business interests of the City of Louisville that the rates to be charged for telephone service in said city shall be adequate to operate and maintain the plant, and provide a fair return upon the investment, for the reason that a telephone company, in the nature of things, can never be a finished or completed property, but must continue to grow from time to time, and, in order to do this, new capital must be procured from the investing public with which to take care of this continued growth; and this can only be done by the issuance and sale of stock, the issu-
35 ance and sale of bonds, or by a floating indebtedness. If a floating indebtedness or bonds are used a time arrives in a few years when no further additions to the capital can be provided, the investing public being unwilling to loan money beyond a certain amount on a telephone plant, and are unwilling to take bonds secured by prior liens upon such plants; and, therefore, it is necessary that this additional capital be provided from time to time by the issuance and sale of stock, and unless the plant can show a fair and reasonable return, the investing public are unwilling to invest their money in such business. And, therefore, both in the interest of the public and of your orator and its stockholders, it is necessary that remunerative rates be charged.

Your orator further charges that the value of the service to each and every patron in the City of Louisville increases as the number of its subscribers increases, in, that they have a more comprehensive service, and are enabled to use their telephone instruments to reach a much larger number of people, both in business and social matters, and thus the service becomes more valuable as the number of subscribers increase; and your orator further charges that as the service and its value increases, the expense of conducting the business increases correspondingly, and each additional patron involves additional capital, and a corresponding increase in operating, maintenance and depreciation charges; so that, it is a fact, and your orator so charges, that increased patronage involves and entails upon your orator a corresponding increase in capital account and a corresponding increase in operating, maintenance and depreciation accounts, but the profits do not increase in the same ratio.

X.

Your orator further states that its rates and charges established for telephone service rendered by it to its patrons in Louisville are reasonable rates, and yield only a fair, reasonable and just return upon the capital invested, and that the said rates and
36 charges provided by said ordinance passed by the Common Council are arbitrarily unreasonable, unjust and confiscatory, and, if enforced, will not yield to your orator sufficient money to meet the necessary cost of conducting its said business in said city, and maintaining its plant and appliances, and will yield no just or

fair return upon the large capital invested by it, and the stockholders of your orator will be deprived of a fair and just return and dividend upon their stock, and your orator and its stockholders will be deprived of their property without due process of law, and their property taken for public use without just compensation, contrary to the Fourteenth Amendment of the Constitution of the United States, which provides:

"Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

XI.

Your orator further states that the said ordinance passed by the Council of the said City of Louisville, and approved on the 2nd day of March, 1909, fixing the maximum rates to be charged for telephone service, provides that it shall be unlawful for any corporation, firm or individual furnishing telephone service within said city to charge therefor an amount exceeding that fixed in said ordinance, and that any violation of the provisions of said ordinance shall be punished by a fine of not less than five dollars nor more than twenty-five dollars, and that each charge in excess of the amount fixed in said ordinance shall constitute a separate offense.

The defendant, the City of Louisville, is threatening, and will, unless restrained by this Honorable Court, undertake to enforce said ordinance and prosecute your orator under the provisions of said ordinance, and will issue and find, or cause to be issued and found, numerous warrants and indictments against your orator, charging it with violations of the provisions of said ordinance in charg-
37 ing greater rates for telephone service than those fixed in said ordinance. And so your orator says that unless the defendant, the City of Louisville, shall, by the orders and decrees of this Court, be restrained from executing and enforcing said ordinance, your orator will suffer great and irreparable injury.

Your orator says that it has no adequate remedy at law for the redress of the injuries which will be inflicted upon it, and upon its property and business by the enforcement of said ordinance, or by the suing out and issuance of processes of law by the defendant for the purpose of enforcing said ordinance, and that it is necessary, in order to the protection of your orator's rights and property, that a court of equity shall interfere with its power of preventing injury.

XII.

Your orator states that the amount in dispute far exceeds the sum or value of five thousand dollars, exclusive of interest and costs; that any interference with your orator's property in the City of Louisville, or any interference with the rates and charges established by your orator for the use of its telephone service in said city, will cause your orator irreparable injury and damage; that the city authorities of said city will, unless restrained, injure, destroy and otherwise interfere with and seriously damage your orator's business in said city.

For as much as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant, if it can, show why your orator should not have the relief hereby prayed for and make answer to the matters hereinbefore stated and charged, your orator prays that your Honor grant unto it a writ of subpœna of the United States of America, addressed to the City of Louisville,
commanding it, on a certain day, to appear and answer unto
38 this Bill of Complaint, and to abide and perform such order and decrees in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

And your orator further prays that a provisional or preliminary injunction be issued, restraining the said defendant from any interference with the property of your orator, or from any interference with the rates and charges of your orator for telephone service in said city, and that it be restrained and enjoined from taking any action looking to the enforcement of said ordinance, or from undertaking to prosecute or enforce said ordinance against your orator, or from, in any manner, interfering with or disturbing your orator's vested right, or, in any manner, undertaking to deprive your orator of its property without due process of law.

And your orator further prays that, upon a final hearing, its right to charge the rates established and fixed by it be declared and sustained; and that the defendant be perpetually enjoined and restrained from enforcing, or attempting to enforce, or execute, said ordinance against your orator.

And your orator prays for such other, further, and general relief as may to equity and good conscience belong.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President.*
FAIRLEIGH, STRAUS & FAIRLEIGH,
Solicitors.

Attest:

[SEAL.] J. W. HUNTER, JR., *Sec'y.*

WM. L. GRANBERY, *Counsel.*

39 STATE OF TENNESSEE,
County of Davidson, ss:

James E. Caldwell, being duly sworn, says that he is President of the Cumberland Telephone & Telegraph Company, the complainant herein; that he has read the foregoing Bill of Complainant, and knows the contents thereof: that the same is true of his own knowledge, except as to the matter- therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

JAMES E. CALDWELL.

Subscribed and sworn to by the said James E. Caldwell in my presence, and sworn to by him before me this 6th day of March, 1909.

My commission expired on the 8th day of October, 1912.

[SEAL.] HARVEY D. JACOB,
Notary Public in and for the County of Davidson, in the State of Tennessee.

Exhibit No. 1, referred to in the Bill of Complaint, is as follows:

40 EXHIBIT No. 1 WITH BILL OF COMPLAINT.

Charter of the Cumberland Telephone & Telegraph Company of Kentucky, 1907.

40½ Charter of the Cumberland Telephone & Telegraph Company of Kentucky, 1907.

41 *Articles of Incorporation of the Cumberland Telephone and Telegraph Company.*

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56), 1561, of the General Statutes of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles, hereinafter expressed.

ARTICLE 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Cumberland Telephone & Telegraph Company. Its principal place of business is in the city and county of Henderson, State of Kentucky.

ARTICLE 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges and district telegraph and messenger systems.

ARTICLE 3. The amount of capital stock authorized is not less than Four Hundred Thousand Dollars and may be increased to Three Million Dollars, divided into shares of One Hundred Dollars each, and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

ARTICLE 4. The existence of said corporation commences on the eighth day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount, and a majority in number of the stockholders.

ARTICLE 5. The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed 50 per cent. of its capital stock actually paid in.

ARTICLE 6. The affairs of said Company are to be controlled by a Board of nine Directors, and a President and Vice-President to

be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of three members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing the second class one year there-
42 after, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, and all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

ARTICLE 7. The private property of the corporators and stockholders of said corporation shall be exempt from the corporate debts of said Company.

Witness our hands, this eighth day of June, 1883.

E. S. BABCOCK, JR.
PAUL J. MARRS.
MILO G. KELLOGG.
E. P. HUSTON
E. T. BAKER.
J. COMPTON.
E. P. COPELAND.
ISAAC T. RHEA.
ENOS M. BARTON.

STATE OF INDIANA,
Vanderburgh County:

Personally appeared before me the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., E. P. Huston, Paul J. Marrs, M. G. Kellogg and E. T. Baker, with whom I am personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Evansville, Ind., County and State aforesaid, this first day of June, 1883.

[SEAL.] GEO. S. CLIFFORD,
Notary Public, Vanderburgh County, Ind.

STATE OF TENNESSEE,
County of Davidson, ss:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, J. Compton, E. P. Copeland, and Isaac T. Rhea, with whom I am

personally acquainted, who acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

43 In testimony whereof I have hereto signed my name and affixed my seal of office in the city of Nashville, County and State aforesaid, this second day of June, 1883.

[SEAL.] H. L. CLAIBORNE,
Notary Public.

COOK COUNTY,
State of Illinois, set:

Personally appeared before me, the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof I have hereto signed my name and affixed my seal of office in the City of Chicago, in the County and State aforesaid, this the sixth (6) day of June, 1883.

[SEAL.] WM. S. GRANGER,
Notary Public.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the Cumberland Telephone & Telegraph Company *was* this day lodged in my office for record, and the same with the foregoing certificates thereon endorsed *is* with this certificate truly recorded in my office.

Witness my hand this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed September 1, 1883, and recorded September 3, 1883.

Amendments to Articles of Incorporation of the Cumberland Telephone and Telegraph Company.

Adopted at a meeting of the Stockholders in Henderson, Ky., December 21, 1883.

Resolved, That the following be and they are hereby adopted as amendments of the original Articles of Incorporation of the Cumberland Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the Stockholders:

44 1st. That Article Three (3) of said Articles of Incorporation be and it is hereby amended so as to read as follows:

ARTICLE (3). The amount of capital stock authorized is Two Million Seven Hundred Thousand Dollars ($2,700,000) and may be increased to Three Millions of Dollars ($3,000,000) by the vote of the stockholders holding a majority of the stock which may have

been issued. Said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers on call of the Board of Directors and after twenty days' notice of such call. Such notice shall be sufficient, if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company; and such vote may be in person or by proxy, properly authorized by written or printed appointment signed by such stockholders.

ELISHA S. BABCOCK, JR.
ENOS M. BARTON.
MILO G. KELLOGG.
ERASTUS P. HUSTON.
ELWOOD T. BAKER.
ISAAC T. RHEA.
J. COMPTON.
PAUL J. MARRS.
E. P. COPELAND.

Attest:
ANDREW HESS.
JNO. J. WARD.

STATE OF TENNESSEE,
Davidson County, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, duly commissioned and qualified, on this 24th day of December, A. D. 1883, Isaac T. Rhea and J. Compton, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 24th day of December, 1883.

[SEAL.]

H. L. CLAIBORNE,
Notary Public.

45 STATE OF INDIANA,
Vanderburgh County, set:

Personally appeared before me, the undersigned Notary Public in and for said County and State, duly commissioned and qualified, on this 21st day of December, A. D. 1883, Elisha S. Babcock, Jr., Enos M. Barton, Milo G. Kellogg, E. P. Huston, and E. T. Baker, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument for the purposes therein mentioned.

Witness my hand and Notarial Seal, this 21st day of December, 1883.

[SEAL.]

J. W. NEESEN,
Notary Public, V. C.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before the undersigned authority, the above named Paul J. Marrs and Elijah Percy Copeland, with both of whom I am personally acquainted, and who severally acknowledged that they executed the foregoing instrument for the purposes therein contained.

In faith whereof, I have hereto set my hand and affixed my seal as a qualified Notary Public of and for the Parish of New Orleans, Louisiana, at New Orleans, in the twenty-seventh day of December, A. D. 1883.

[SEAL.] ANDREW W. HERD,
Notary Public.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was this day lodged in my office for record, and that I have recorded it the foregoing, and this certificate, in my said office.

Witness my hand, this January 1st, 1884.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed for record January 25, 1884; recorded January 30, 1884.

46 *Amendment to Articles of Incorporation of the Cumberland Telephone & Telegraph Company.*

Whereas, The Cumberland Telephone & Telegraph Company, having its principal place of business at Henderson, in Henderson County, State of Kentucky, U. S. A., adopted Articles of Incorporation under the general statutes of said State, dated June 8, 1883, and also subsequently adopted amendments thereof and thereto, dated December 21, 1883, said Articles original and amendatory having been executed, acknowledged and published and recorded, as required by the said laws of the said State. And whereas, the said Company, having duly organized under said Articles, has been operating and doing business thereunder and as therein provided ever since. And whereas, it was deemed to the best interest of the Company that the Board of Directors be increased from nine to twelve members, and with a view thereto and for the purpose of increasing the same at the regular annual meeting of the stockholders of the said Company, held on the 14th day of May, 1889, in Henderson County, Kentucky. Pursuant to the by-laws of the Company and upon due notice to the stockholders of said Company thereof, the following resolution was proposed for adoption to said meeting, viz.:

Resolved, That Article 6 of the Articles of Incorporation adopted by this Company, dated June 8, 1883 (amended December 21,

1883), and under which it is now operating, be amended and changed so as to be and to read as follows, viz.:

The affairs of said Company are to be controlled by a Board of twelve Directors, and a President and a Vice-President to be selected by said Board of Directors, from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively of four members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing, the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such classification, the stockholders of the Company shall elect for a term of three years a number of Directors equal to the number whose term expires on the day of such election, all other vacancies to be filled in accordance with the by-laws of the corporation.

47 Should there, from any cause, be a failure to elect on said day, then they may be elected at any regular meeting thereafter or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Resolved, further, That the President and Secretary of this Company be, and they are hereby, instructed and directed for and in the name of this Company to execute, acknowledge, and perfect this amendment in due and proper form, as required in such cases, as the deed and act of this corporation, and that the same be executed and acknowledged, published and recorded by them as soon as practicable. And, whereas, said resolution was adopted and approved by a vote of Fifteen Thousand One Hundred and Twenty-nine (15,129) shares, the same being more than a majority of all the shares and votes of the stockholders of said Company, and none opposing, as appears by the recorded vote and minutes of said proceedings. Now, in accordance therewith, the said Cumberland Telephone & Telegraph Company, through W. M. Duncan, the President of the same, and Jno. Lenihan, the Secretary thereof, as such, for and on behalf of said Company and the stockholders thereof, do hereby adopt, the said amendment hereinbefore set forth in said resolutions as a part of the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, to be as effective and controlling as if it were part of the original.

In witness whereof, the said W. M. Duncan, as President aforesaid, and the said Jno. Lenihan, as Secretary aforesaid, have hereto attached the name and seal of the said Cumberland Telephone & Telegraph Company, and also their own signatures as President and Secretary executing the same.

Done at Henderson, Henderson County, Kentucky, on this, the 14th day of May, A. D. 1889.

[SEAL.] CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By W. M. DUNCAN, *President*, and
By JNO. LENIHAN, *Secretary*.
W. M. DUNCAN, *President*.
JNO. LENIHAN, *Secretary*.

STATE OF KENTUCKY,
Henderson County, set:

I, G. W. Smith, Clerk of the County Court in and for the County and State aforesaid, do certify that the foregoing Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my office and acknowledged before me by W. M. Duncan, as President of said Company,
48 and by John Lenihan, Secretary of said Company, to be their act and deed, and the same is, with this certificate, truly recorded in my office.

Witness my hand, this 14th day of May, 1889.

GEO. W. SMITH, *C. H. C. C.*

Filed June 17th and recorded June 28, 1889.

Acceptance of Present Constitution.

At a regular meeting of the Board of Directors of the Cumberland Telephone & Telegraph Company, held at the office of the Company in the City of Henderson, State of Kentucky, on the 31st day of January, 1896, Wm. Litterer, V. E. Schwab, G. G. Hall, W. N. Johnson, M. J. Smith, A. G. Sharpe, Henry Sperry, W. W. Berry, J. E. Caldwell, who constituted a majority and quorum of the Directors of said corporation, being present, the following resolution was adopted:

Resolved, That, whereas, this corporation was created under and in pursuance of Chapter 56 of the General Statutes of the State of Kentucky, and acts amendatory thereto, and its Articles of Incorporation were properly signed, acknowledged, recorded and published on the 8th day of June, 1883; and, whereas, amended articles of incorporation were properly and legally adopted, signed, acknowledged, published and recorded, on the 21st day of December, 1883, and on the 14th day of May, 1889, by the stockholders of the Cumberland Telephone & Telegraph Company; and, whereas, said corporation has been doing business for some years past and is now doing business under said Articles of Incorporation, in the State of Kentucky, now in obedience to and in compliance with the requirements of Section 570 of the Kentucky Statutes, the Cumberland Telephone & Telegraph Company accepts the provisions of the present Constitution of the State of Kentucky, which was adopted on the 28th day of September, 1891, and Leland Hume, the Secretary of this Company, is hereby directed and instructed to file a copy of this resolution certified under the seal of this Company, in the office of the Secretary of State of the State of Kentucky.

JAMES E. CALDWELL,
President Cumberland Telephone & Telegraph Company.
[SEAL.] LELAND HUME,
Secretary Cumberland Telephone & Telegraph Company.

Received at executive office February 3, 1896, Sec. 570, Kentucky Statutes.

49 *Articles of Incorporation of the Great Southern Telephone and Telegraph Company.*

We, whose names are signed hereto, hereby associate ourselves together and do hereby constitute ourselves a body corporate and politic under and by virtue of Chapter Fifty-six (56), 1561, of the General Statutes of the Commonwealth of Kentucky, and the Acts amendatory thereof, and for the purposes and upon the terms and conditions in these Articles hereinafter expressed:

ARTICLE 1. The names of the corporators are we whose names are undersigned. The name of the corporation is the Great Southern Telephone & Telegraph Company. Its principal place of business is in the City and County of Henderson, State of Kentucky.

ARTICLE 2. The general nature of the business proposed to be transacted is the erecting, maintaining and operating of telephone and telegraph lines, telephone exchanges, and all such business as is usually done by telephone exchanges, and district telegraph and messenger systems.

ARTICLE 3. The amount of capital stock authorized is not less than Seven Hundred Thousand Dollars, and may be increased to Ten Millions of Dollars, divided into shares of One Hundred Dollars each, and is to be paid in by the subscribers upon call and twenty days' notice from the Board of Directors of said Company.

ARTICLE 4. The existence of said corporation commences on the 8th day of June, 1883, and terminates in twenty-five years from said date unless sooner dissolved by agreement of three-fifths in amount and a majority in the number of the stockholders.

ARTICLE 5. The affairs of said Company are to be controlled by a Board of nine Directors, and a President and Vice-President to be selected by said Board of Directors from their own number. The said Board of Directors shall be stockholders of the Company, and shall be elected by the stockholders. The Directors elected at the first meeting of the stockholders shall be divided into three classes, numbered consecutively, of three members each, the term of office of the first class to expire on the day of the annual election of said Company; then next ensuing the second class one year thereafter, and the third class two years thereafter. At each annual meeting after such a classification the stockholders of the Company shall elect for a term of three years a number of Directors
50 equal to the number whose term expires on the day of such election, all other vacancies to be filled in accordance with the by-laws of the corporation. Should there from any cause be a failure to elect on said day, then they may be elected at any regular meeting thereafter, or at any meeting of the stockholders called for that purpose, and the said Board of Directors may also employ such other officers and agents as they may deem necessary.

Witness our hands, this eighth day of June, 1883.

ELISHA S. BABCOCK, Jr.,
PAUL J. MARRS,
MILO G. KELLOGG,
ENOS M. BARTON.

STATE OF INDIANA,
Vanderburgh County:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, E. S. Babcock, Jr., Paul J. Marrs, and M. G. Kellogg, with whom I am personally acquainted, and acknowledged that they signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereby sign my name and affix my seal of office in the City of Evansville, State and County aforesaid, this first day of June, 1883.

[SEAL.] GEO. S. CLIFFORD,
Notary Public, Vanderburgh County, Ind.

STATE OF ILLINOIS,
Cook County:

Personally appeared before the undersigned Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Enos M. Barton, with whom I am personally acquainted, who acknowledged that he signed the foregoing instrument of writing for the purposes therein mentioned.

In testimony whereof, I hereto sign my name and affix the seal of office in the City of Chicago, State and County aforesaid, this 2d day of June, 1883.

[SEAL.] WM. G. GRANGER,
Notary Public.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing Articles of Incorporation of the
51 Great Southern Telephone & Telegraph Company was this day lodged in my office for record, and the same, with this and the foregoing certificates, is truly recorded in my said office.

Witness my hand, this 8th day of June, 1883.

GEO. W. SMITH, *C. H. C. C.*,
By THOS. H. BEVERLY, *D. C.*

Filed for record July 2, and recorded July 5, 1883.

Amendments to Articles of Incorporation of the Great Southern Telephone & Telegraph Company.

Adopted at a Meeting of the Stockholders of said Company in the City of Henderson, Ky., on the 21st Day of December, 1883.

(1) Resolved, That the following be and they are hereby adopted as Amendments of the Original Articles of Incorporation of the Great Southern Telephone & Telegraph Company, and that the same be subscribed and acknowledged by the stockholders:

(1) That Article three (3) of the said Articles of Incorporation be, and it is hereby, amended so as to read as follows:

ARTICLE THREE. The amount of capital stock authorized is Two Millions of Dollars, and may be increased to Ten Millions of Dollars by the vote of the stockholders holding a majority of the stock which may have been issued. The said stock shall be divided into shares of One Hundred Dollars each, and shall be paid in by the subscribers upon call of the Board of Directors, and after twenty days' notice of such call. Such notice shall be sufficient if duly mailed and directed to each stockholder at the postoffice nearest his usual place of residence. Such shares shall be transferable by endorsement, but such transfer shall not entitle the holder thereof to vote at any meeting of the stockholders unless the same shall be transferred on the books of the Company.

(2) At all meetings of the stockholders, each stockholder shall be entitled to one vote for every share of stock standing in his name on the books of the Company, and such vote may
52 be in person or by proxy, properly authorized by written or printed appointment, signed by such stockholder.

SAM'L BAYARD.
ROBERT K. DUNKERSON.
ELISHA S. BABCOCK, Jr.
MILO G. KELLOGG.
ERASTUS PERRY HUSTON.
ENOS M. BARTON.
PAUL J. MARRS.
EDWARD T. BAKER.
WILLIAM D. BABCOCK.

1883, December 21st, acknowledged by Sam'l Bayard, Robert K. Dunkerson, Elisha S. Babcock, Jr., Milo G. Kellogg, Erastus Perry Huston, Enos M. Barton, Paul J. Marrs, and Elwood P. Baker, to be their act and deed.

Attest:

GEO. W. SMITH, *C. H. C. C.*,
By THOS. C. BEVERLY, *D. C.*

STATE OF NEW YORK,
City and County of New York:

On this twenty-ninth day of December, one thousand eight hundred and eighty-three, before me, a Notary Public in and for said City and County, personally came William D. Babcock, to me known, and known to me to be one of the persons who signed the foregoing resolution, and he duly acknowledged that he subscribed the same for the purposes therein expressed.

Witness my hand the day and year last above mentioned.

[SEAL]

M. H. DILLENBECK,
Notary Public, City and County of New York.

STATE OF KENTUCKY,
Henderson County, set:

I, George W. Smith, Clerk of the Henderson County Court, do certify that the foregoing instrument of writing was produced to me in my county on December 21, 1883, and acknowledged by Samuel Bayard, Robert K. Dunkerson, Elisha S. Babcock, Jr., Milo G. Kellogg, Erastus Perry Huston, Enos M. Barton, Paul J. Marrs, and Edward T. Baker, to be their act and deed, and the same is with this and *for* the foregoing certificate truly recorded in my office.

Witness my hand, this 7th day of January, 1884.

[SEAL.] GEO. W. SMITH, *C. H. C. C.*,
By T. H. BEVERLY, *D. C.*

Filed for record January 25, 1884; recorded January 30, 1884.

53 *Acceptance of Present Constitution.*

At a meeting of the Board of Directors of the Great Southern Telephone & Telegraph Company, held at the office of the Company in the City of Henderson, State of Kentucky, on March 4, 1897, A. W. Crandell, B. F. Knight, J. M. Brown, Geo. G. Hall, Paul J. Marrs, and J. J. Fowler, who constituted a majority and quorum of Directors, being present, the following resolution was adopted:

"That the President be authorized to take such action as may be necessary to protect the interests of this Company in its chartered rights, in the State of Kentucky."

We hereby certify that the above is a true and correct copy of the resolution adopted at a meeting of the Board of Directors held on March 4, 1897, in the City of Henderson, State of Kentucky.

A. W. CRANDELL, *President.*
[SEAL.] H. C. DOZIE,
Secretary Pro Tem.

In obedience to and in compliance with the above resolution, I, A. W. Crandell, President of the Great Southern Telephone & Telegraph Company, a corporation created under and in pursuance with Chapter 56 of the General Statutes of the State of Kentucky, and Acts amendatory thereto, represent that said Articles of Incorporation were properly signed, acknowledged and recorded on the 8th day of June, 1883, in the office of the Clerk of the Circuit Court of the County of Henderson, in the State of Kentucky, and in obedience to and in compliance with the above resolution, I file this declaration, accepting on behalf of the Great Southern Telephone & Telegraph Company the provisions of the present Constitution of the State of Kentucky, which was adopted on the 28th day of September, 1891.

A. W. CRANDELL, *President.*

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

I, Charles T. Seniat, Notary Public duly qualified, for the Parish of Orleans, City of New Orleans, and State of Louisiana, do certify that this instrument of writing was this day produced before me by A. W. Crandell, President of the Great Southern Telephone & Telegraph Company, and by him then and there acknowledged before me to be his act and deed, and the act and deed of said corporation for the purposes therein mentioned.

New Orleans, August 16, 1897.

CHAS. T. SENIAT,
Notary Public.

[SEAL]

CHAS. FINLEY,
Secretary of State,

By G. R. H.

Filed August 18, 1897.

54 *Articles of Consolidation of the Cumberland Telephone and Telegraph Company and the Great Southern Telephone and Telegraph Company.*

Whereas, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, and the Great Southern Telephone & Telegraph Company, of Henderson, Henderson County, Kentucky, are corporations organized and chartered under and by virtue of the laws of the Commonwealth of Kentucky with power, each, to do a telephone and telegraph business, either or both, and are each now engaged in the telephone business; and,

Whereas, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, and the northern part of the State of Mississippi, and the business done by and the lines, exchanges, toll-stations, etc., of the Great Southern Telephone & Telegraph Company are exclusively in Louisiana, and the southern, middle and western parts of Mississippi; and,

Whereas, Neither of said Companies, in Kentucky or elsewhere, own or operate competing lines, exchanges or toll-stations or any line or structure parallel or competing with any line or structure of the other Company; and,

Whereas, It is deemed to be to the advantage and interest of said Companies and their stockholders that they should be consolidated, and their lines and systems connected and extended as one system; and the Directors of both Companies, or a majority of the Directors of each Company have agred upon terms of consolidation;

Now, to effectuate the same, the said Cumberland Telephone & Telegraph Company, and the Great Southern Telephone & Telegraph Company, do hereby agree upon, enter into, and make and form these Articles of incorporation or Consolidation, namely:

First. The said two corporations do now hereby consolidate and become one corporation under, and by the name of "Cumberland Telephone & Telegraph Company," and,

Second. The principal office or place of business of this corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and,

Third. The business of this Company shall be the same as that of the consolidating Companies, parties hereto, namely, to
55 conduct the telephone and telegraph business, either or both, and with power to own, acquire, and operate all lines, exchanges, toll-stations, and offices and other property necessary or proper for the efficient conduct of its said business; and,

Fourth. The capital stock of this Company shall be Three Million Dollars in the aggregate, divided into thirty thousand shares (30,000) of One Hundred Dollars ($100) each, and,

Fifth. The stockholders of the two consolidating Companies shall be the stockholders of this Company, and their respective interests and holdings shall be as follows: For each and every share (now one hundred dollars each) of and in the Cumberland Telephone & Telegraph Company, now issued and outstanding, and which aggregate 16,957 shares, or $1,695,700, the owners and holders thereof shall be entitled to, and shall receive, one share of and in the capital stock of this Company, and in the aggregate 16,957 shares, amounting to $1,695,700; and for every two shares (which shares are now one hundred dollars ($100) each) of and in the Great Southern Telephone & Telegraph Company, now issued and outstanding, and which aggregate 18,917 shares, amounting to $1,891,700, the owners, as holders thereof, shall be entitled to, and shall receive, one share of and in the capital stock of this Company, or 9,458½ shares of the stock of this consolidated Company, aggregating $945,850. Certificates in due and proper form shall be issued and delivered, upon the surrender and delivery up for cancellation of the old or outstanding certificates.

Sixth. The shares to which the owners and holders of the stock of and in the Great Southern Telephone & Telegraph Company, are, or may be entitled hereunder, and the certificates issuable therefor, shall be issued and received and taken, subject to the following provisions and conditions, viz.: Lawsuits are now pending in the courts of the State of Louisiana, wherein and whereby the said Great Southern Telephone & Telegraph Company is sought to be held liable for a large amount of back taxes, alleged to be due from said Company to said State, and minor divisions thereof, parishes, municipal corporations, etc., and which litigation is pending undetermined; now, if these suits shall be determined adversely to the said Great Southern Telephone & Telegraph Company, and it shall be held liable for said taxes, or any part thereof, sought to be collected, either in said suits, or any other hereafter to be instituted, or renewals thereof, in the event any of the present suits fail upon some ground not going to the merits, and new suits shall be instituted upon the same demands, then, and in such event or events, the holders of said shares and certificates (9,458½)

for $945,850 shall not be entitled to, neither shall any of them receive, any dividends which shall or may be declared upon the stock of this Company at, or for, any of the four quarters next in order following the determination of the liability aforesaid,
56 but the amounts to which such shareholders would otherwise be entitled as dividends so declared, shall be and become the property of this consolidated Company, and shall be passed to its credit; but it shall pay such back-tax judgments and decrees, in consideration thereof.

After the four quarterly dividend days have passed, the payment of the succeeding dividends to the said stockholders shall be resumed, whether said four quarterly dividends so retained shall suffice to pay said decrees or judgments or not; and,

Seventh. The officers by whom the affairs of this Company shall be conducted, the times and places of their election, the duration of this Company, or its period of existence, the highest amount of indebtedness which it shall incur, and the non-liability of its stockholders for the corporate indebtedness, shall be as now provided by the Articles of Incorporation of the consolidating Companies, under the laws of the Commonwealth of Kentucky, subject to the modifications resulting from an increase of the capital stock from an aggregate of $2,700,000 of capital stock, to $3,000,000; and,

Eighth. This agreement shall not be effectual, nor the consolidation complete or valid, until it shall have been consented to in writing by the owners of at least two-thirds of the said capital stock of each of said consolidating Companies, or corporations, obtained and given as is required by the laws of the Commonwealth of Kentucky, in case of the proposed consolidation of two or more corporations; and,

Ninth. The written consent of said stockholders, that is to say, the writings evidencing the same, shall be delivered up and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notice required by law to be given to the stockholders of their respective companies, was given as required by law, and that the said written evidences of consent so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders so consented; and,

Tenth. The certificates of the officer, or Notary Public taking the acknowledgment of the officers and directors of the consolidating Companies hereto, for the purposes of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths in writing, provided for in the Ninth Article hereof, have been filed with, and are in the custody and possession of the President and Secretary of the Cumberland Telephone & Telegraph Company.

Eleventh. The officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company shall be the officers, directors, and managing agents of and for this consolidated
57 Company until the next regular election, according to the laws, by-laws, and charter of the said (consolidating) Cum-

berland Telephone & Telegraph Company, and shall, as the officers, directors, and managing agents of the said Company, conduct the business; and,

Twelfth. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities of this corporation and the rights and duties of its stockholders shall be as prescribed by the laws of the Commonwealth of Kentucky.

In Witness Whereof, the Cumberland Telephone & Telegraph Company has caused its name and corporate seal to be affixed by James E. Caldwell, its President, and Leland Hume, its Secretary, and these articles to be subscribed by eight (8) of its eleven directors, on this, the 4th day of March, A. D. 1898; and,

The Great Southern Telephone & Telegraph Company has caused its name and corporate seal to be affixed by A. W. Crandall, its President, and Paul J. Marrs, its Secretary, and these articles to be subscribed by six (6) of its nine directors, on this, the day and date last above written.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

(Signed) By JAMES E. CALDWELL,

President of the Cumberland Telephone & Telegraph Company.

[SEAL.] LELAND HUME,

Secretary of the Cumberland Telephone & Telegraph Company.

W. LITTERER,
E. M. BARTON,
W. W. PERRY,
A. G. SHARPE,
V. E. SHWAB,
HENRY SPERRY,
M. J. SMITH,
JAMES E. CALDWELL,

Directors of the Cumberland Telephone & Telegraph Company.

GREAT SOUTHERN TELEPHONE & TELEGRAPH COMPANY,

By A. W. CRANDALL,

President Great Southern Telephone & Telegraph Company.

[SEAL.] And by PAUL J. MARRS,

Secretary Great Southern Telephone & Telegraph Company.

And by JOHN N. BOFINGER,
A. W. CRANDALL,
FRANK B. KNIGHT,
W. H. BOFINGER,
E. M. BARTON,
PAUL J. MARRS,

Directors Great Southern Telephone & Telegraph Company.

58 STATE OF TENNESSEE,
County of Davidson, set:

I, Ed. V. Jones, Notary Public in and for State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the Cumberland Telephone & Telegraph Company, is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and

They did severally further make oath and say that the owners of 14,632 shares of the stock of said consolidating Cumberland Telephone & Telegraph Company did approve of and consent to the consolidation aforesaid of the said Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company in writing, and that said writings or written consents are now on file with them, and in their custody and possession as President and Secretary of the Cumberland Telephone & Telegraph Company for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 16,957 shares, and no more, and that the said 14,632 shares held by consenting owners, *is* more than two-thirds thereof; and

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in the Hopkinsville New Era, a newspaper printed and circulating therein, said County being the principal place of said Company's business, and that the
59 said notice was published as aforesaid more than two weeks previous to entering into the said agreement and executing said articles of Consolidation; and they did severally make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants James E. Caldwell and Leland Hume, as

President and Secretary of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and

The said James E. Caldwell and the said Leland Hume also then, this day, severally acknowledged the within instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and I do further certify that Henry Sperry, M. J. Smith, James E. Caldwell, William Litterer, E. M. Barton, W. W. Berry, A. G. Sharpe, V. E. Shwab, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve members, and no more, and that eight members *is* a majority of a full board, and that they as Directors of said Company, signed and executed the foregoing instrument or articles, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 4th day of March, 1898.

[SEAL.] ED. V. JONES,
Notary Public.

My Commission expires January 1, 1900. Notary Public for Davidson County, Tenn.

STATE OF KENTUCKY,
County of Henderson, set:

I, J. L. Kimmel, a Notary Public, in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named, A. W. Crandall, President of the Great Southern Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Paul J. Marrs, the Secretary of the same Company, with
60 each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument, or Articles of Consolidation, and they being by me duly and severally sworn, did severally depose and say, that the said A. W. Crandall was, and is, the President of the said Great Southern Telephone & Telegraph Company, and that the said Paul J. Marrs was, and is, the Secretary thereof; and

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the

seal of the said Great Southern Telephone & Telegraph Company, is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of said Company to said instrument; and

They did severally further make oath and say that the owners of 18,274 shares of the stock of said consolidating Great Southern Telephone & Telegraph Company did approve of, and consent to, the consolidation aforesaid of the Cumberland Telephone & Telegraph Company, and the Great Southern Telephone & Telegraph Company, in writings, and that said writings or written consents, are now on file with them, and in their custody and possession as President and Secretary of the Great Southern Telephone & Telegraph Company for the said Company, and that the capital stock issued and outstanding, of the said consolidating Company, the Great Southern Telephone & Telegraph Company, is 18,917 shares, and no more, and that the said 18,274 shares held by consenting owners, *is* more than two-thirds thereof; and,

They did also then further and severally make oath and say, that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein, and that such notice was also published in the Henderson Journal, a newspaper printed and circulated in Henderson County, said county being the principal place of said Company's business, and that the said notice was published as aforesaid, more than two weeks previous to entering into the said agreement and executing said Articles of Consolidation; and

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument made by affiants, A. W. Crandall and Paul J. Marrs, as President and Secretary of the Great Southern Telephone & Telegraph Company, were by them delivered to and filed with, and are in the custody and possession of, said James E. Caldwell and Leland Hume, as President and Secretary of the Cumberland Telephone & Telegraph Company for such corporation; and

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The said A. W. Crandall and the said P. J. Marrs also then, this day, severally acknowledged the within instrument to be the act and deed of said Great Southern Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company; and

I do further certify that A. W. Crandall, F. B. Knight, Jno. N. Bofinger, W. H. Bofinger, E. M. Barton, and P. J. Marrs, with each of whom I am personally acquainted, this day also did personally appear before me, and make oath and say, respectively, that they are Directors of the above named consolidating corporation, the Great Southern Telephone & Telegraph Company; that the Board of Directors now consists of nine members, and no more, and that six *is* a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument, or articles; and that they severally acknowledged the said instrument to be the

act and deed of said Great Southern Telephone & Telegraph Company, and to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office, in Henderson County, Kentucky, on this, the 3d day of March, 1898.

My commission expires January 29, 1900.

[SEAL.] J. L. KIMMEL,
Notary Public for Henderson County, Ky.

STATE OF KENTUCKY,
Christian County, set:

I, John P. Prowse, Clerk of the Christian County Court, do certify that the foregoing Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, were this day produced to me in my office with the foregoing certificates thereon endorsed, whereupon the same *was* indexed, lodged, and ordered to record, and with this and the foregoing certificates, *has* been duly recorded in my office, this March 11, 1898.

JNO. P. PROWSE, *Clerk.*

STATE OF KENTUCKY,
Henderson County, set:

I, I. H. Hart, Clerk of the Henderson County Court, certify that the foregoing Articles of Consolidation, of the Cumberland Telephone & Telegraph Company, and the Great Southern Tele-
62 phone & Telegraph Company, *was* this day lodged in my office for record, and that I have recorded *it*, the foregoing and this certificate, in my said office.

Given under my hand, this, March 16, 1898.

A copy.

Attest:

J. H. HART,
Clerk Henderson County Court.

Filed and recorded March 29, 1898, in Book 7, Page 176.

Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.

Statement and Amendment.

STATE OF KENTUCKY,
Christian County, set:

Whereas, At the annual meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office,

in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the thirty thousand shares of the capital stock of said Company, and which resolution was, and is, as follows, viz:

Resolved, That the capital stock of this Company, which is now 30,000 shares of One Hundred Dollars ($100) each, aggregating Three Millions of Dollars ($3,000,000), be increased to sixty thousand (60,000) shares, of One Hundred ($100) each, so as, after such increase, to aggregate Six Millions of Dollars ($6,000,000) in all; and, be it further

Resolved, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore, but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the au-
63 thorized capital stock of the Company at the time," and be it further

Resolved, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby, authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and proper Statement and Amendment, to carry out and effectuate this resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given, as, and in manner and form as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make and execute, under the seal of the Company, and acknowledge the statement and Amendment necessary to carry said resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and Geo. R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, A. G. Sharpe, Wm. Litterer, James E. Caldwell, Henry Sperry, being eight of the twelve Directors, constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March

4, 1898, and were recorded March 11, 1898, in Book of Articles of Incorporation No. One, pages 323 to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898, have been and are hereby amended in accordance with the said resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Six Millions of Dollars ($6,000,000) in the aggregate, divided into sixty thousand (60,000) shares of One hundred Dollars ($100) each." and so that the said Seventh Article of the said Articles of Con-
64 solidation shall have added thereto the following amendment and modification, viz:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

In Witness Whereof, we, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this, the 3d day of March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899.)

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President, Etc.*

Attest:
[SEAL.] LELAND HUME, *Secretary.*

W. LITTERER,
A. G. SHARP,
HENRY SPERRY,
M. J. SMITH,
V. E. SHWAB,
W. W. BERRY,
GEO. R. KNOX,
Directors of the Cumberland Telephone & Telegraph Company.

STATE OF TENNESSEE,
Davidson County, set:

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said in-

strument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument; and,

They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing statement and amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is thirty thousand (30,000) shares, and no more, and that the said 25,014½ shares held by the said consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed statement and amendments was mailed to the address of each and every of the stockholders of the said Company as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company, and for the purpose therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, V. E. Shwab, Henry Sperry, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consist of twelve Directors and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office, in Davidson County, Tennessee, on this, the third day of March, A. D. 1899.

[SEAL.]

ED. V. JONES,

Notary Public for Davidson County, Tennessee.

My seal of office expires on the 1st day of 1900.

66 STATE OF KENTUCKY,
Christian County, set:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify that the foregoing statement and Amendment of Articles of Incorporation, of the Cumberland Telephone & Telegraph Company, was this day produced to me in my county with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this March 4, 1899.

JNO. P. PROWSE, *Clerk.*

Filed and recorded March 15, 1899, Book 8, page 245.

Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.

Statement and Amendment.

STATE OF KENTUCKY,
Christian County, set:

Whereas, At the annual meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation existing and organized, under and by virtue of the laws of the State of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the second day of March, A. D. 1899, a Resolution was then voted for, passed and consented to in writing by the owners of 25,014½ shares of the 30,000 shares of the capital stock of said Company, and which Resolution was, and is, as follows, viz.:

Resolved, That the capital stock of this Company, which is now 30,000 shares of $100 each, aggregating Three Millions of Dollars, be increased to sixty thousand (60,000) shares of One Hundred Dollars ($100) each, so as after such increase, to aggregate Six Millions of Dollars in all; and, be it further

Resolved, That the Articles of Incorporation of this Company, be so amended as to provide that the amount of indebtedness to which this Company shall subject itself, shall not be limited to 50 per cent of the capital stock actually paid in, as heretofore, but may be to any amount not exceeding the authorized capital stock of the Company at the time, and to read in this respect as follows:

67 "The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the authorized capital stock of the Company at the time;" and be it further

Resolved, That the President of this Company, and the Directors of this Company, or a majority thereof be, and they are hereby, authorized, empowered, and directed to sign, make, execute under the seal of the Company, and acknowledge the necessary and proper Statement and Amendment, to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and

Whereas, Notice in writing was given as, and in manner and form as required by law, by the Secretary of the Company, to each and every stockholder of the said Company, more than twenty days before the day and date of said meeting, that the proposition embodied in the said Resolution would be then submitted to said stockholders for their consideration and action; and

Whereas, At a meeting of the Board of Directors of this Company, duly held on the 3d day of March, A. D. 1899, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to sign, make, and execute, under the seal of the Company, and acknowledge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and G. R. Knox, A. G. Sharp, W. W. Berry, Wm. Litterer, V. E. Shwab, James E. Caldwell, M. J. Smith, Henry Sperry, being eight of the twelve Directors constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company, under which it now exists and operates, and particularly the Fourth and Seventh Articles of the "Articles of Consolidation," entered into by the Cumberland Telephone & Telegraph Company and the Great Southern Telephone & Telegraph Company, which Articles are dated March 4, 1898, and were recorded March 11, 1898, in "Book of Articles of Incorporation" No. One, page 323 to 337, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State of the State of Kentucky, on the 29th day of March, A. D. 1898, have been and are hereby amended in accordance with the said Resolution, and so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Six Millions of Dollars in the aggregate, divided into sixty thousand shares of One Hundred Dollars each," and

68 So that the Seventh Article of the said Articles of Consolidation shall have added thereto the following Amendment, and modification, viz.:

"The greatest amount of indebtedness to which said Company shall subject itself at any time shall not exceed the amount of the authorized capital stock, at the time."

In Witness Whereof, We, the persons and officers aforesaid have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secretary thereof, and have subscribed our names this, the 3d day of

March, A. D. One Thousand Eight Hundred and Ninety-nine (A. D. 1899).

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President, etc.*

Attest:
LELAND HUME,
Secretary.

A. G. SHARP,
W. LITTERER,
HENRY SPERRY,
M. J. SMITH,
V. E. SHWAB,
W. W. BERRY,
GEO. R. KNOX,
Directors of the Cumberland Telephone & Telegraph Company.

STATE OF TENNESSEE,
Davidson County:

I, Ed. V. Jones, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incorporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume, was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be
69 the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument, and,

They did severally further make oath and say, that the owners of twenty-five thousand and fourteen and one-half shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is thirty thousand shares, and no more, and that the

said 25,014½ shares held by the said consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company and to be their act and deed as President and Secretary of the said Company, and for the purposes therein expressed and contained; and,

I do further certify that Geo. R. Knox, W. W. Berry, M. J. Smith, Henry Sperry, V. E. Shwab, Wm. Litterer, A. G. Sharp, and James E. Caldwell, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors, and no more, and that eight members are a majority of a full board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on the third day of March, A. D. 1899.

ED. V. JONES,

[SEAL.] *Notary Public for Davidson County, Tennessee.*

My seal of office expires on the 1st day of 1900.

70 STATE OF KENTUCKY,
Christian County, set:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing statement and Amendment of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my county with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this, March 4, 1899.

JOHN P. PROWSE, *Clerk.*

Filed and recorded March 15th, 1899, Book 8, Page 245.

An Act to Incorporate the Ohio Valley Telephone Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

1st. That James B. Speed, James Clark, H. N. Gifford, William H. Johnson, J. M. Brown, William H. Newman, and A. P. Speed, their associates, successors and assigns, be, and they hereby are, made a body corporate, with the name, The Ohio Valley Telephone Company, and as such corporation may sue and be sued, enter into contracts and have and exercise all such powers and privileges as usually appertain to corporations. That the corporators named in this section shall act as directors until their successors are elected and qualified; and in the event of the failure of any of said corporators to act, their vacancies shall be filled by election by those acting.

2d. The capital stock of said Company shall be Five Hundred Thousand Dollars ($500,000), with the right to increase the same to One Million Dollars ($1,000,000), divided into shares of One Hundred Dollars ($100) each, which shall be personal property, and evidenced by the certificates of the Company under its seal, and shall be transferable only on the books of the Company. Transfers of stock shall not be valid except as between the parties thereto until the same are regularly entered upon the books of the Company as aforesaid; and the said stock shall be paid in such manner and under such conditions as the Board of Directors may prescribe.

3d. The said corporators above named and their survivors, or a majority of them, may receive subscriptions to the capital
71 stock of said Company, payable at such time, place, and manner as may be specified in such subscription; and said Company may organize for business when Three Hundred Thousand Dollars ($300,000) of stock shall have been subscribed.

4th. Said Company shall have the power to purchase, construct, maintain, and operate, within this State and elsewhere, telephone lines, exchanges, and systems, and to conduct all the business incident and pertaining thereto, and may purchase or acquire and dispose of real estate, machinery, apparatus, poles, wires, patents or interests therein, licenses, rights, and franchises relating to such business or to be used by said Company therefor; and said Company may manufacture or buy, sell, or lease any machinery, devices, patents, or interests therein, licenses and supplies.

5th. The said Company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the City of Louisville, with and by the consent of the General Council of said city; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed upon, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents, or interests therein, equipments, right of way, easements and servitudes, in highways, streets, and alleys in the City of Louisville, together with all of its properties; and when purchased or

leased, shall have the power to maintain and operate the same along, over, or under the highways, streets, and alleys in the said City of Louisville; provided, however, that such telephone poles, lines, and systems have heretofore been granted the right of way or easements in the highways, streets, and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip, and maintain telephone lines along, over, or under the highways, streets, and alleys, and across any watercourse within this Commonwealth, so as not to obstruct the same; and said Company may connect its lines with those of any other Company, on such terms as may be agreed upon.

6th. The said Company is authorized to borrow money, and may issue and sell its negotiable coupon bonds, not exceeding one-fourth of the capital stock in existence at the time of issuing such bonds, payable at such times and places, and bearing such rate of interest, not exceeding — (6) per cent. per annum, payable semi-annually, as may by said Company be determined, and may secure the payments of same by mortgage or deed of trust on all the property of the Company, real, personal, or mixed, and on any or all of its
72 patents, licenses, franchises, easements, rights of way, privileges, rents, poles, and apparatus, with such term and conditions as may be expressed therein.

7th. The principal office of said Company shall be in Louisville, Ky., and the management and administration of the affairs of the said Company shall be by a Board of Directors of not less than three (3) nor more than nine (9), to be elected by the stockholders once in every year, as may be prescribed in the by-laws, and said Directors shall hold their offices until their successors are elected and qualified; and the Directors may elect a President, Vice-President, Secretary and Treasurer, and General Manager, and may appoint such other officers and agents as they may deem necessary, and may prescribe their duties and compensation, and require of them bond, with security thereon, for the faithful performance of their duties, and remove them and appoint others at pleasure; may fill vacancies that may occur in the Board, may make by-laws for the government of the Company, alter, amend, or abolish the same, at any meeting of said subscribers or stockholders of said Company. Each person shall be entitled to one vote for each share of stock standing in his name on the books of the said company, and may cast his vote in person or by proxy.

8th. This Act shall take effect and be in force from its passage.

Approved April 3, 1886.

Acceptance of Present Constitution.

Be it resolved by the Board of Directors of the Ohio Valley Telephone Company, a corporation created by and organized and existing under the Act of the General Assembly of the Commonwealth of Kentucky, approved April 3, 1886, and entitled "An Act to incorporate the Ohio Valley Telephone Company," and having its principal office in Jefferson County, in said State, does hereby accept

the provisions of the Constitution of the Commonwealth of Kentucky known as the Constitution of 1891, and now in force in said State; and, be it further

Resolved, That a copy of this resolution, certified by the Secretary of this Company, under the seal of the Company, be filed in the office of the Secretary of said State.

COMMONWEALTH OF KENTUCKY,
County of Jefferson:

I, J. C. Symmes, Secretary of the Ohio Valley Telephone Company, do hereby certify that the foregoing resolution is a true and perfect copy of the resolution unanimously adopted by the Board of Directors of the Ohio Valley Telephone Company,
73 at a meeting duly and regularly held by the said Board, on the 22d day of January, 1900, as the same appears of said date on page 15 of the record book kept by said Company, and now in my custody as its Secretary.

In Witness Whereof, I have subscribed my name as Secretary and caused the seal of said Company to be attached.

This, the 22d day of January, 1900.

J. C. SYMMES,
Secretary of the Ohio Valley Telephone Company.

[SEAL.] CALEB POWERS, *Secretary of State,*
By H.

Filed January 24, 1900.

Articles of Consolidation of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company.

Articles of Consolidation.

Whereas, The Cumberland Telephone & Telegraph Company, of Hopkinsville, Christian County, Kentucky, a corporation with a capital stock fixed at Six Millions of Dollars, and the Ohio Valley Telephone Company, of Jefferson County, State of Kentucky, a corporation with a capital stock fixed at One Million Dollars, are corporations organized and chartered under, and by virtue of, the laws of the Commonwealth of Kentucky, each with power to do a telephone and telegraph business, either or both, and are each now engaged in said business; and,

Whereas, The business done by, and the lines, exchanges, toll-stations, etc., of the Cumberland Telephone & Telegraph Company are in the States of Kentucky, Tennessee, Illinois, Indiana, Mississippi, and Louisiana; and the business done by, and the lines, exchanges, toll-stations, etc., of the Ohio Valley Telephone Company, are exclusively in Kentucky and Indiana, at Louisville, New Albany, Jeffersonville, and vicinity; and,

Whereas, Neither of said Companies own or operate competing

lines, exchanges, or toll-stations, or any line or structure parallel or competing with any line or structure of the other company, in Kentucky, or elsewhere; and,

Whereas, it is deemed to be to the advantage and interest of said companies, and their stockholders, that they should be consolidated, and their lines and systems connected and extended
74 so as to be one system, and the Directors of both Companies or a majority of the Directors of each, have agreed upon terms of consolidation; and,

Whereas, At regular and duly held meetings of the stockholders of each of the consolidating Companies, the owners and holders of more than two-thirds of the capital stock of each of the said companies, respectively, approved of, and directed this consolidation, and consented thereto in writing, and directed the same to be effected.

Now, to effectuate the same, the said Cumberland Telephone & Telegraph Company, and the Ohio Valley Telephone Company, do hereby agree upon, enter into, and make and form, these Articles of Incorporation and Consolidation, namely:

First. The said two Companies do hereby consolidate and become one corporation under and by the name of "Cumberland Telephone & Telegraph Company," and,

Second. The principal office or place of business of this consolidated corporation shall be at Hopkinsville, Christian County, State of Kentucky, United States of America; and,

Third. The business of this Company shall be the same as that of the consolidated Companies, parties hereto, namely: to conduct the telephone and telegraph business, either or both, and it shall have power to own, acquire, and operate all lines, exchanges, toll-stations, real estate, and buildings, and all other property necessary and proper for the efficient conduct of its business; and,

Fourth. The capital stock of this Company shall be Ten Million Dollars in the aggregate, divided into one hundred thousand shares of One Hundred Dollars each; and,

Fifth. The stockholders of the two consolidating Companies shall be stockholders hereof, and in this consolidated Company, to the extent of their respective interests and holdings therein, as follows:

For each and every share (now One Hundred Dollars each) of, and in, the Cumberland Telephone & Telegraph Company, now issued and outstanding, the owners and the holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company; and for each and every share (now One Hundred Dollars each) of, and in, the Ohio Valley Telephone Company, now issued and outstanding, the owners and holders thereof shall be entitled to, and shall receive, one share of, and in, the capital stock of this Company.

Certificates in due and proper form shall be issued and delivered to them upon the surrender and delivery up for cancellation of the old, or outstanding, certificates now held by the said shareholders of the consolidating Companies. The remainder of the shares of,

and in, the said capital stock of the consolidated Companies
75 shall be held, to be disposed of as required by law, for the use and benefit of this Company; and,

Sixth. This Company shall commence or begin to exist on the day that these Articles of Incorporation shall be filed and recorded in the office of the Secretary of the State of Kentucky, and it shall continue to exist for the period of two hundred years from and after said date; and,

Seventh. This Company may issue negotiable bonds, and secure the same by mortgages and deeds of trust, to an amount in the aggregate, outstanding at any one time, not exceeding the amount of the authorized capital stock of the Company; and may also incur indebtedness not evidenced by negotiable, trust, or mortgage bonds, to an amount not forbidden by the by-laws of the Company; but the private property of the stockholders shall not be subject to the payment of any obligation or indebtedness of this corporation; and,

Eighth. The officers of this corporation shall be: A President, and not more than two Vice-Presidents, a Secretary, a Treasurer and a Board of Directors, to be composed of as many members as the Company may from time to time prescribe, and such subordinate executive committees, and managers, and agents, as this Company, by its by-laws, and from time to time, provides; but the business and affairs of the Companies now consolidating shall be managed and conducted by the officers, directors, and managing agents of the Cumberland Telephone & Telegraph Company until the next regular election of said Company, when the officers, directors, and managing agents of this Company shall be elected for such terms as may be fixed by the Company.

Ninth. The written consent of the stockholders of the consolidating Companies, that is to say, the writings evidencing the same, shall all be delivered up and over by said consolidating Companies to this consolidated Company, for preservation, and the President and Secretary of each of said consolidating Companies, shall make oath in writing, duly acknowledged, to the fact that the notices and advertisements required by law to be given to the stockholders of their respective Companies, was given as required by law, and that the said written evidences of consent, so to be delivered up, are the genuine originals, and that at least two-thirds of their stockholders consented; and,

Tenth. The certificates of the officer, or Notary Public, taking the acknowledgment of the officers and directors of the consolidating Companies hereto, for the purpose of authentication and record, shall truly show, so far as the Presidents and Secretaries of said Companies are concerned, that they made oath that the said affidavits, or oaths in writing, provided for in the Ninth Article hereof, have been filed, and are in the custody and possession of the Presi-
76 dent and Secretary of the Cumberland Telephone & Telegraph Company.

Eleventh. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business,

credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities, and powers, and privileges, and franchises of this corporation, and the rights and duties of its stockholders shall be the same as those of the consolidating Companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations.

In Witness Whereof, the Cumberland Telephone & Telegraph Company has caused its name and its corporate seal to be affixed by James E. Caldwell, its President, and by Leland Hume, its Secretary, and these Articles to be subscribed by seven of its Board of eleven Directors on this, the 27th day of January, A. D. 1900; and

The Ohio Valley Telephone Company has caused its name and corporate seal to be affixed by W. W. Berry, its Vice-President, and by J. C. Symmes, its Secretary, and these Articles to be subscribed by four of its Board of five Directors, on this, the day and date last above written.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL,
President of the Cumberland Telephone & Telegraph Company,
And by LELAND HUME,
Secretary of the Cumberland Telephone & Telegraph Company.
And by ALONZO G. SHARP,
GEO. R. KNOX,
W. W. BERRY,
[SEAL.] V. E. SHWAB,
M. J. SMITH,
W. LITTERER,
JAMES E. CALDWELL,
Directors of the Cumberland Telephone & Telegraph Company.

THE OHIO VALLEY TELEPHONE COMPANY,
By W. W. BERRY,
Vice-President of the Ohio Valley Telephone Company,
And by J. C. SYMMES,
Secretary of the Ohio Valley Telephone Company,
And by W. W. BERRY,
JAMES E. CALDWELL,
[SEAL.] V. E. SHWAB,
W. LITTERER,
Directors of the Ohio Valley Telephone Company.

77 STATE OF TENNESSEE,
County of Davidson:

I, Ed. V. Jones, a Notary Public in and for the County and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone &

Telegraph Company, a corporation, created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the within instrument or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof; and,

That they know the corporate seal of said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal; and

That it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to said instrument; and,

They did severally further make oath and say, that the owners of 31,103½ shares of the stock of said consolidating Cumberland Telephone & Telegraph Company did approve of, and consent, to the consolidation aforesaid, of the said Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing, and that said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the Cumberland Telephone & Telegraph Company, then for the said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Cumberland Telephone & Telegraph Company, is 43,116 shares, and no more, and that the said 31,103½ shares held by consenting owners is more than two-thirds thereof; and,

They did also then further and severally make oath and say that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to entering therein; and that such notice was also published in
78 the Hopkinsville New Era, a newspaper printed and circulating in Christian County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published as aforesaid more than two weeks previous to entering into the said agreement, and executing said Articles of Consolidation; and,

They did severally further make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, James E. Caldwell and Leland Hume, as President and Secretary of said Cumberland Telephone & Telegraph Company, are on file with them, and in their custody and possession, as President and Secretary aforesaid, for said Company; and,

The said James E. Caldwell and the said Leland Hume also then, this day, severally acknowledged the within instrument to

be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company; and,

I do further certify that A. G. Sharp, George R. Knox, W. W. Berry, V. E. Shwab, M. J. Smith, Wm. Litterer, and James E. Caldwell, with each of whom I am personally acquainted, this day did also personally appear before me and make oath, and say, respectively, that they are Directors of the above named consolidating corporation, the Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of eleven members and no more, and that seven members *is* a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument, or Articles, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 27th day of January, 1900.

[SEAL.] ED. V. JONES,
Notary Public for Davidson County, Tennessee.

My commission expires January, 1904.

STATE OF TENNESSEE,
County of Davidson:

I, Ed. V. Jones, a Notary Public in and for the County and State aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named W. W. Berry, Vice-President of the Ohio Valley Telephone Company, a corporation created and existing under and
79 by virtue of the laws of the State of Kentucky, and the within named J. C. Symmes, Secretary of the same Company, with each of whom I am personally acquainted, and who are personally known to me to be such Vice-President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me, and produced the within instrument, or Articles of Consolidation, and they, being by me duly and severally sworn, did severally depose and say, that the said W. W. Berry was, and is, the Vice-President of the Ohio Valley Telephone Company, and that the said J. C. Symmes was, and is, the Secretary thereof; and,

That they know the corporate seal of the said Company, and that the seal affixed to the said instrument, and purporting to be the seal of the said The Ohio Valley Telephone Company, is such seal; and,

That it was so affixed by order of the Board of Directors of the said Company, and that by like order, they signed the name of said Company to said instrument; and,

They did severally further make oath and say, that the owners

of 5,447 shares of the stock of the said consolidating the Ohio Valley Telephone Company, did approve of, and consent to, the consolidation aforesaid, of the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, in writing; and that said writings, or written consents, are now on file with them, in their custody and possession, as Vice-President and Secretary of the Ohio Valley Telephone Company, for said Company, and that the capital stock issued and outstanding of the said consolidating Company, the Ohio Valley Telephone Company, is 5,494 shares, and no more, and that the said 5,447 shares, held by consenting owners, *is* more than two-thirds thereof; and,

They did also then further and severally make oath and say, that written notice of the intention to consolidate was mailed to the address of each and every of the stockholders of said Company, as required by law, more than twenty days previous to entering therein, and that such notice was also published in the New Era, a newspaper printed and circulating in Jefferson County, Kentucky, said County being the principal place of said Company's business, and that the said notice was published, as aforesaid, more than two weeks previous to entering into the agreement, and executing said Articles of Consolidation; and,

They did further severally make oath and say, that the affidavits required by the Ninth Article of said instrument, made by affiants, W. W. Berry and J. C. Symmes, as Vice-President and Secretary of the said the Ohio Valley Telephone Company, were by them delivered to, and filed with, and are in the custody and possession of, James E. Caldwell and Leland Hume, as Presi-
80 dent and Secretary of the consolidated the Cumberland Telephone & Telegraph Company, for said corporation; and,

The said W. W. Berry, and the said J. C. Symmes, also then, this day, severally acknowledged the within instrument to be the act and deed of the said, the Ohio Valley Telephone Company, and to be their act and deed, as Vice-President and Secretary of the said Company; and,

I do further certify that W. W. Berry, V. E. Shwab, Wm. Litterer, and James E. Caldwell, with each of whom I am personally acquainted, this day did also appear before me, and make oath and say, respectively, that they are Directors of the above named consolidating corporation, the Ohio Valley Telephone Company, that the Board of Directors now consists of five members, and no more, and that four *is* a majority of a full Board, and that they, as Directors of said Company, signed and executed the foregoing instrument, or Articles; and they severally acknowledged the said instrument to be the act and deed of the said the Ohio Valley Telephone Company, and to be their act and deed as Directors of said Company, for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on this, the 27th day of January, 1900.

[SEAL.] ED. V. JONES,
Notary Public for Davidson County, Tennessee.

My commission expires January, 1904.

STATE OF KENTUCKY,
Christian County:

I, John P. Prowse, Clerk of the Christian County Court, do certify that the foregoing Articles of Consolidation for the Cumberland Telephone & Telegraph Company with the Ohio Valley Telephone Company *was* this day produced to me in my office with the foregoing certificates of acknowledgements thereon endorsed.

Whereupon, the same was lodged and ordered to record, and with this and the foregoing certificates, *has* been duly recorded in my office.

This, January 29, 1900.

JNO. P. PROWSE, *Clerk.*

I, C. B. Hill, Secretary of State, certify that the hereto attached Articles of Incorporation were this day filed with me, in my office, by said corporation, and a check for $3,000, being tax on the increase in capital stock, was this day deposited, payable to the State Treasurer.

Given under my hand, this 24th day of March, 1900.

C. B. HILL,
Secretary of State.
By HARRY G. TANDY,
Ass't Secretary of State.

81 *Amended Articles of Incorporation of the Cumberland Telephone & Telegraph Company.*

Statement and Amendment.

STATE OF KENTUCKY,
Christian County, set:

Whereas, At a special meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Kentucky, pursuant to due and proper notice, on Thursday, the 8th day of January, A. D. 1903, a Resolution was then voted for, passed and consented to in writing by the owners of 80,126 shares of the capital stock of said Company, and which Resolution was and is as follows, viz.:

Resolved, That the authorized capital stock of this Company, which is now One Hundred Thousand (100,000) shares of One Hundred Dollars ($100) each, aggregating Ten Millions of Dollars ($10,000,000) be increased to Two Hundred Thousand (200,000) shares of One Hundred Dollars ($100) each, so as after such increase to aggregate Twenty Millions of Dollars ($20,000,000) in all; and be it further

Resolved, That the President of this Company and the Directors of this Company, or a majority thereof, be, and they are hereby authorized, empowered and directed to make, sign, execute under the seal of this Company, and acknowledge the necessary and proper Statement and Amendment to carry out and effectuate this Resolution, the same to be filed and recorded as required by law; and,

Whereas, Notice in writing was given as and in manner and form as required by law, by the Secretary of the Company, by written notice mailed to each and every stockholder twenty days before the day and date of said meeting that the proposition in the said Resolution would be then submitted to the said stockholders for their consideration and action; and,

Whereas, At a meeting of the Board of Directors of the Cumberland Telephone & Telegraph Company, duly held on the 9th day of January, A. D. 1903, thereafter, the Resolution aforesaid was ratified and adopted, and the undersigned authorized and directed to
82 sign, make, execute under the seal of the Company, and acknowledge the Statement and Amendment necessary to carry said Resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and James E. Caldwell, W. W. Berry, Wm. Litterer, M. J. Smith, F. O. Watts, V. E. Shwab, A. G. Sharp, W. R. Cole, Geo. R. Knox, being nine of the twelve Directors, constituting the Board of Directors of the said Company, do hereby state and declare that the Articles of Incorporation of the said Cumberland Telephone & Telegraph Company under which it now exists and operates, and particularly the fourth article of the "Articles of Consolidation" entered into by the Cumberland Telephone & Telegraph Company and The Ohio Valley Telephone Company, which articles are dated the 27th day of January, A. D. 1900, and were recorded on January 29, 1900, in "Book of Articles of Incorporation," pp. 370-379, inclusive, in the office of the Clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State, of the State of Kentucky, on the 24th day of March, A. D. 1900, have been and are hereby amended in accordance with the said Resolution, and *was* so amended that the said Fourth Article reads, and shall read, as follows:

"The capital stock of this Company shall be Twenty Millions of Dollars ($20,000,000) in the aggregate, divided into Two Hundred Thousand (200,000) shares of One Hundred Dollars ($100) each.

In Witness Whereof, We, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the Secre-

tary thereof, and have subscribed our names, this the 9th day of January, A. D. 1903.

[SEAL.] CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President.*

Attest:
LELAND HUME, *Secretary.*

W. W. BERRY,
WM. LITTERER,
M. J. SMITH,
F. O. WATTS,
V. E. SHWAB,
A. G. SHARP,
W. R. COLE,
GEO. R. KNOX,
JAMES E. CALDWELL,
Directors of the Cumberland Telephone & Telegraph Company.

83 STATE OF TENNESSEE,
Davidson County:

I, J. C. Symmes, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do certify that the within named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named Leland Hume, the Secretary of the said Company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the Articles of Incoporation of the said Company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was, and is, the President of the said Cumberland Telephone & Telegraph Company, and that the said Leland Hume was, and is, the Secretary thereof, and that they know the corporate seal of the said Company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument; and,

They did severally make oath and say that the owners of Eighty Thousand One Hundred and Twenty-six shares of the stock of the said Company did vote for and consent in writing to the foregoing Statement and Amendment, and that the said writings, or written consents, are now on file with them, and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company

is Ninety-three Thousand Five Hundred and Sixty-three (93,563) shares, and no more, and that the said Eighty Thousand One Hundred and Twenty-six shares held by the consenting owners are more than two-thirds thereof; and,

They did also further and severally make oath and say that written notice of the said proposed Statement and Amendment was mailed to the address of each and every of the stockholders of the said Company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said Leland Hume, also have this day severally acknowledged the said instrument to be the act and deed of the said Cum-
84 berland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and for the purposes therein expressed and contained; and,

I do certify that James E. Caldwell, W. W. Berry, Wm. Litterer, M. J. Smith, F. O. Watts, V. E. Shwab, A. G. Sharp, W. R. Cole, George R. Knox, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that the Board of Directors now consists of twelve Directors, and no more, and that eight members are a majority of a full Board; and that they, the Directors of said Company, signed and executed the foregoing instrument or Amendment, and they severally acknowledged the said instrument to be the act and deed of said Cumberland Telephone & Telegraph Company and to be their act and deed as Directors of said Company for the purposes therein expressed.

In Witness Whereof, I have hereunto set my hand and seal of office, in Davidson County, Tennessee, on the 9th day of January, A. D. 1903.

[SEAL.] J. C. SYMMES,
Notary Public for Davidson County, Tennessee.

My seal of office expires on 2d day of August, 1903.

STATE OF KENTUCKY,
Christian County, set:

I, Jno. P. Prowse, Clerk of the Christian County Court, in the State aforesaid, do certify, that the foregoing Statement and Amendment of the Articles of Incorporation of the Cumberland Telephone & Telegraph Company, was this day produced to me in my County with the foregoing certificate thereon endorsed; whereupon the same was indexed, lodged, and ordered to record, and with this and the foregoing certificate, has been duly recorded in my office, this, January 15, 1903.

JNO. P. PROWSE, *Clerk.*

Filed and certificate issued January 29, 1903.

C. B. HILL,
Secretary of State.

85 COMMONWEALTH OF KENTUCKY,
Office of the Secretary of State:

I, —— ——, Secretary of State for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In Testimony Whereof, I hereunto sign my name, and have caused my official seal to be affixed.

Done at Frankfort, this — day of ——, 19—.

—— ——,
Secretary of State.

86 STATE OF KENTUCKY,
Christian County, set:

Whereas, at a special meeting of the stockholders of the Cumberland Telephone & Telegraph Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Kentucky, which meeting was held at the Company's principal office in Hopkinsville, Christian County, Ky., pursuant to due and proper notice on Tuesday, the 6th day of August, 1907, a resolution was then voted for, passed and consented to in writing by the owners of 160,175 shares of the capital stock of said company, and which resolution was and is as follows, viz:

"Resolved, That the authorized capital stock of this company, which is now 200,000 shares of $100 each, aggregating $20,000,000, be increased to 202,000 shares of $100 each, so as, after such increase, to aggregate $20,200,000 in all; and it be further

"Resolved, That the legal domicile of the Company be removed from Hopkinsville, Christian County, Kentucky, to Louisville, Jefferson County, Kentucky; and be it further

"Resolved, That the president of this company, and the directors of this company, or a majority thereof, be and they are hereby authorized, empowered and directed to make, sign, execute under the seal of the company, and acknowledge the necessary and proper statement and amendment to carry out and effectuate this resolution, the same to be filed and recorded as required by law."

And, whereas, notice in writing was given as, and in the manner and form, required by law, by the Secretary of the Company, by written notice mailed to each and every stockholder twenty days before the day and date of said meeting that the proposition in said resolution would be then submitted to the said stockholders for their consideration and action; and,

Whereas, at a meeting of the Board of Directors of the Company, duly held on the 12th day of September, 1907, thereafter, the resolution aforesaid was ratified and adopted, and the under-
87 signed authorized and directed to sign, make, execute under the seal of the Company and acknowledge the statement and amendment necessary to carry said resolution into effect.

Now, therefore, we, James E. Caldwell, the President of the Cumberland Telephone & Telegraph Company, and W. W. Berry,

W. S. Bransford, James E. Caldwell, William Litterer, W. K. Phillips, James S. Robinson, V. E. Shwab and M. J. Smith, being eight of the fifteen directors constituting the Board of Directors of said company, do hereby state and declare that the articles of incorporation of the said Cumberland Telephone & Telegraph Company under which it now exists and operates, and particularly the fourth article of the Articles of Consolidation entered into by the Cumberland Telephone & Telegraph Company and the Ohio Valley Telephone Company, which articles are dated the 27th day of January, 1900, and were recorded on January 29, 1900, in "Book of Articles of Incorporation," pp. 370 to 379 inclusive, in the office of the clerk of the County Court of Christian County, Kentucky, and which were also filed and recorded in the office of the Secretary of State, of the State of Kentucky, on the 24th day of March, A. D. 1900, have been and are hereby amended in accordance with the said resolution, and are so amended that the said fourth article reads and shall read as follows:

"The capital stock of this company shall be $20,200,000 in the aggregate, divided into 202,000 shares of $100.00 each.

And that said Articles of Consolidation shall be further amended, particularly in the second article of said Articles of Consolidation, so as to read as follows:

"The principal office or place of business of this consolidated corporation shall be at Louisville, Jefferson County, State of Kentucky, United States of America."

In witness whereof, we, the persons and officers aforesaid, have hereunto affixed the name of the said Cumberland Telephone & Telegraph Company, and caused its seal to be affixed by the
88 Secretary thereof, and have subscribed our names this, the 18th day of September, A. D. 1907.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,
By JAMES E. CALDWELL, *President.*

Attest:
J. W. HUNTER, JR., *Secy.*

W. S. BRANSFORD,
W. K. PHILLIPS,
JAMES S. ROBINSON,
JAMES E. CALDWELL,
W. W. BERRY,
M. J. SMITH,
W. LITTERER,
V. E. SHWAB,
Directors.

STATE OF TENNESSEE,
County of Davidson:

I, J. C. Symmes, a Notary Public in and for the State and County aforesaid, duly appointed, commissioned, and acting as such by virtue of the laws of said State, do hereby certify that the within

named James E. Caldwell, President of the Cumberland Telephone & Telegraph Company, a corporation created and existing under and by virtue of the laws of the State of Kentucky, and the within named John W. Hunter, Jr., the Secretary of the said company, with each of whom I am personally acquainted, and who are personally known to me to be such President and Secretary, and to be the same persons whose signatures are subscribed to the foregoing instrument, this day personally appeared before me and produced the said instrument or amendment to the articles of incorporation of the said company, and they being by me duly and severally sworn, did severally depose and say that the said James E. Caldwell was and is the President of the said Cumberland Telephone
89 & Telegraph Company, and that the said John W. Hunter, Jr., was and is the Secretary thereof, and that they know the corporate seal of the said company, and that the seal affixed to the said instrument and purporting to be the seal of the said Cumberland Telephone & Telegraph Company is such seal, and that it was so affixed by order of the Board of Directors of the said Company, and that by the like order they signed the name of the said Company to the said instrument; and,

They did severally make oath and say that the owners of 160,175 shares of the stock of the said Company did vote for and consent in writing to the foregoing statement and amendment, and that the said writings, or written consents are now on file with them and in their custody and possession, as President and Secretary of the said Company for it, and that the capital stock issued and outstanding of the said Company is 192,132½ shares, and no more; and that the said 160,175 shares held by the consenting owners are more than two-thirds thereof; and

They did also further and severally make oath and say that written notice of the said proposed statement and amendment was mailed to the address of each and every of the stockholders of the said company, as required by law, more than twenty days previous to the day and date on which the said meeting was held, at which it was considered and adopted, and the said James E. Caldwell and the said John W. Hunter, Jr., also have this day severally acknowledged the said instrument to be the act and deed of the said Cumberland Telephone & Telegraph Company, and to be their act and deed as President and Secretary of the said Company, and for the purposes therein expressed and contained; and,

I do certify that W. W. Berry, W. S. Bransford, James E. Caldwell, William Litterer, W. K. Phillips, James S. Robinson, V. E. Shwab and M. J. Smith, with each of whom I am personally acquainted, this day also personally appeared before me and made oath and said, respectively, that they are Directors of the above named Cumberland Telephone & Telegraph Company; that
90 the Board of Directors now consists of fifteen directors, and no more, and that eight members are a majority of a full Board; and that they, the Directors of said Company, signed and executed the foregoing instrument or amendment, and they severally acknowledged the said instrument to be the act and deed of said

Cumberland Telephone & Telegraph Company, and to be their act and deed as Directors of said Company for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and seal of office, at my office in Davidson County, Tennessee, on the 18th day of September, A. D. 1907.

(Signed) J. C. SYMMES,
Notary Public,
Notary Public for Davidson County, Tenn.

My commission expires 16th day of October, 1907.

STATE OF KENTUCKY,
Christian County, set:

I, G. L. Campbell, Clerk of the Christian County Court, do certify that the foregoing amendment to the Articles of Incorporation of the Cumberland Telephone & Telegraph Company was this day produced to me in my office with the foregoing certificate of acknowledgment thereon endorsed.

Whereupon the same was, this day, at 3 o'clock p. m., filed, ordered to record, indexed and with the foregoing and this certificate has been duly recorded in my office. This Sept. 19, 1907

(Signed) G. L. CAMPBELL, *Clerk.*

I, Phil. B. Thompson, Clerk of the County Court of Jefferson County, in the State of Kentucky, do certify that on this day at 9:55 o'clock a. m., the foregoing amended Articles of Incorporation were produced to me in my office, and that I have recorded them, this, and the foregoing certificate in my said office.

Witness my hand this 23rd day of September, 1907.

(Signed) PHIL. B. THOMPSON, *Clerk.*

91 A copy.
Attest:
PHIL. B. THOMPSON, *Clerk.*
By LENORE DURBECK, *D. C.*

Filed and certificate issued September 26, 1907.

H. V. McCHESNEY,
Sec'y of State.

Upon which Bill of Complaint there issued the following subpœna in Chancery:

The President of the United States of America to City of Louisville, Kentucky, Greeting:

You are hereby commanded to appear before our Circuit Court of the United States of America, for the Western District of Kentucky, at the Federal Court Hall, in the City of Louisville, on the first Monday in March, next, to answer a Bill in Equity exhibited

against it in our said Court by Cumberland Telephone & Telegraph Company, which you shall in no wise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief-Justice of the Supreme Court of the United States of America, and the seal of our said Circuit Court hereto affixed, at the Clerk's Office of said court, in Louisville, this 8th day of February, A. D. 1909, and in the 133rd year of our Independence.

Attest:

[SEAL.] A. G. RONALD,
C. C. C., W. K. D.
By HENRY F. CASSIN.
His Deputy.

MEMORANDUM.—The defendant is to enter its appearance in the suit in the Clerk's office, on or before the 1st day of March, next, the day at which the writ is returnable, otherwise the bill may 92 be taken pro confesso.

A. G. RONALD, *Clerk.*
By HENRY F. CASSIN,
His Deputy.

Upon which the Marshal made the following return:

"Received the within subpœna in chancery at Louisville, Ky., February 8-1909, and executed same in Louisville, Ky., February 8-1909, on the City of Louisville, Kentucky, by delivering a true copy hereof to James F. Grinstead, Mayor. This Feby. 8-1909.

G. W. LONG,
U. S. M.
By WM. BLADES,
Chief Deputy."

And on February 9th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

This day came the complainant and moved the Court to grant a restraining order against the defendant, the City of Louisville, Kentucky, conformable to the prayer of the bill, and now, upon a reading of the bill and the exhibits therewith filed, it is considered that cause exists for the granting of a restraining order. It is therefore ordered that the defendant, the City of Louisville, its officers, agents, attorneys, employés, and each of them, and all other persons be, and they are hereby, strictly enjoined and restrained from, in any manner, enforcing or undertaking to enforce against the complain-

ant, the Cumberland Telephone & Telegraph Company, the
93 provisions or any provision of an ordinance entitled, "An Ordinance repealing an ordinance entitled, "An Ordinance confirming and ratifying Section 5 of an Act passed by the General Assembly of the Commonwealth of Kentucky and approved on the 3rd day of April, 1886,' and entitled 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along and under any highway, street or alley in the City of Louisville,' approved August 17th, 1886; and passed by the Common Council of the defendant, the City of Louisville, and approved by the Mayor of said city on the 23rd day of January, 1909, and from in any way, under color of said ordinance, or any provision thereof, interfering with the property of the said complainant, or in any way disturbing or interfering with any of its poles, wires, conduits or other appliances upon, in or under the streets, alleys and highways of the City of Louisville, or in any other way interfering with or disturbing the business of the said complainant which it is conducting in the said city; and from, in any manner, interfering with the complainant's right to conduct a telephone business in the said City of Louisville until the 19th day of February, 1909, until which time the complainant, the Cumberland Telephone & Telegraph Company, is given within which to move the Court for a preliminary injunction, due notice whereof shall be given to the defendant, the City of Louisville. Copy of this order shall be regarded as sufficient notice to the said City of the making of said motion. This restraining order shall remain in force until said time, and until said motion for a preliminary injunction shall have been heard and disposed of, and until the further order of this Court.

94 And on February 19th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

This day came the complainant, the Cumberland Telephone & Telegraph Company, by Fairleigh, Straus & Fairleigh and William L. Granbery, its counsel. Came also the defendant, the City of Louisville, by Clayton B. Blakey, Huston Quin and W. O. Harris, its counsel, and filed exceptions to the complainant's Bill of Complaint herein.

Came again the said defendant by its said counsel and filed its Demurrer to the complainant's Bill of Complaint herein.

Came again the complainant by its said counsel and moves the Court to grant a temporary injunction pendente lite, in accordance

with the prayer of the bill; and said motion coming on to be heard, was argued by counsel, and the Court not being fully advised thereof, takes time.

The exceptions to the Bill of Complaint above referred to are as follows:

UNITED STATES OF AMERICA:

The Circuit Court of the United States in and for Sixth Circuit and Western District of Kentucky, at Louisville.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

95 Exceptions for impertinence taken by the above named defendant, City of Louisville, to the Bill of Complaint of the above named plaintiff, Cumberland Telephone & Telegraph Company, filed in this cause on 8th day of February, 1909.

First Exception. For that the whole of the fourth paragraph of the said bill is impertinent.

Second Exception. For that the whole of the fifth paragraph of the said bill is impertinent.

Third Exception. For that the whole of the sixth paragraph of the said bill, excepting only the last sentence thereof, is impertinent.

In all which particulars this exceptant excepts to the said bill as impertinent and humbly insists that the said impertinence may be expunged therefrom.

CLAYTON B. BLAKEY,
HUSTON QUIN,
W. O. HARRIS,
Of Counsel for Defendant.

The demurrer above referred to is as follows:

96 UNITED STATES OF AMERICA:

The Circuit Court of the United States in and for the Sixth Circuit and Western District of Kentucky, at Louisville.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

The Demurrer of the City of Louisville, Defendant, to the Bill of Complaint of Cumberland Telephone & Telegraph Company, the Above-named Plaintiff.

This defendant, City of Louisville, Kentucky, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner or form as the same are therein set forth and alleged, doth demur thereto, and for causes of demurrer showeth:

First. That it appeareth by plaintiff's own showing by the said bill that this Court has no jurisdiction to try and determine the facts therein set forth, and that by the plaintiff's own showing by the bill some other court of equity has proper jurisdiction.

Second. That it appears by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by said bill against this defendant.

97 Third. That said Bill of Complaint of the plaintiff is wholly without equity.

Wherefore, and for divers other errors and imperfections, and for good causes of demurrer in said bill contained, this defendant humbly demands the judgment of this Honorable Court, whether it shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and it humbly prays to be hence dismissed, with its reasonable costs in this behalf sustained.

CLAYTON B. BLAKEY,
HUSTON QUIN,
W. O. HARRIS,
Of Counsel for Defendant.

STATE OF KENTUCKY,
Jefferson County, ss:

James F. Grinstead makes solemn oath and says that he is Mayor of the City of Louisville, Kentucky, defendant, and its highest and chief executive officer, and that the foregoing demurrer is not interposed for delay.

——.

Subscribed and sworn to before me, this 19th day of February, 1909. My commission expires on 29th day of Jan'y, 1912.

J. F. DAVIS,
Notary Public in and for Jefferson County, Kentucky.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

CLAYTON B. BLAKEY,
Of Counsel for Defendant.

98 And on February 26th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Came now the above named complainant, the Cumberland Telephone & Telegraph Company, and also the defendant, City of Louisville, by their respective attorneys, and hereby consent that this cause of action may be now submitted to the Court on the exceptions to the bill filed herein by the defendant, and also on the demurrer filed by defendant to said bill.

99 And on March 4th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

This day *came* the complainant, the Cumberland Telephone and Telegraph Company, and asks leave to file an amended bill, and thereupon it is ordered that the submission of this cause, upon the motion of the complainant for a preliminary injunction pendente lite, and upon the defendant's demurrers to the bill, be set aside, and leave is granted the complainant to file an amended bill; and thereupon the complainant tendered and offered to file an amended bill; and it is ordered that said amended bill be, and it is now, filed, and the demurrers heretofore filed by the defendant are made to apply to the bill as amended.

It is further ordered that the complainant's motion for a preliminary injunction pendente lite, and the defendant's demurrers to the bill, as amended, be submitted for judgment thereon.

Said Amended Bill, above referred to, is as follows:

100 Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Amended Bill.

The complainant, the Cumberland Telephone & Telegraph Company, by leave of Court first had and obtained, amends its Bill of Complaint herein and says:

I. That the said The Ohio Valley Telephone Company, referred to and stated in the original bill, in good faith and in reliance upon the ordinance passed by the Common Council of the City of Louisville, and approved August 17, 1886, which is fully set out in the original bill; and in reliance upon the obligation of the contract made by said ordinance immediately after its passage and acceptance, to-wit, in August, 1886, proceeded in good faith to purchase and acquire materials and appliances needful in its said business, and it did in good faith, and in reliance upon said ordinance and said contract, purchase and acquire large quantities of property, material and appliances, and proceeded to construct, and it did construct, telephone lines upon the highways, streets and alleys of the City of Louisville, and did construct and maintain a telephone exchange in the City of Louisville, and carried on and conducted a telephone business in said city, and furnished to all the inhabitants and citizens of said city who desired it, telephonic facilities, and continued so to do until the making of the Articles of Con-

101 solidation stated in the original bill, the complainant, the Cumberland Telephone & Telegraph Company, has and does now conduct a telephone business in the City of Louisville. It has and does now render telephone and telegraph service to all the inhabitants of said city who desire such service. Moreover, in strict accordance with the terms of said contract between the defendant, the City of Louisville, and said The Ohio Valley Telephone Company, it has carried, and does now carry, upon its poles and in its underground conduits the fire alarm and police wires of the defendant, City, free of charge to said City, which said wires have been, and are now daily, used by said City in the conduct of its fire and police departments. It has largely extended and improved the plant, appliances and businesses which, before said consolidation, were owned and conducted by said The Ohio Valley Telephone Company, and in doing so it has expended large sums of money in addition to that expended by The Ohio Valley Telephone Company, so that upon its plant and telephone appliances in the City of Louisville, which it now owns and operates, there has been expended more than one million seven hundred thousand dollars, all of which was done upon the faith of and in reliance upon the said ordinance passed by the Common Council of the City of Louisville on the 17th

day of August, 1886, and the contract thereby made between the City of Louisville and the said The Ohio Valley Telephone Company, and upon the faith of, and in reliance upon, the obligation of said contract.

II. The complainant further says that the ordinance which was passed by the Common Council of the City of Louisville, and approved by the Mayor of said City on the 23d day of January, 1909, and purporting to and attempting to repeal the said ordinance passed by the Common Council of the City of Louisville and approved August 17, 1886, which ordinance is fully set out and stated in the original bill, was passed and approved without the consent of the complainant, and over and against its protest.

102 III. The complainant further says that the said defendant, the City of Louisville, is asserting that since the passage of said ordinance, approved January 23, 1909, your orator has no right to conduct a telephone business in the City of Louisville: that its poles, wires, conduits and other appliances employed by it in the conduct of its business are upon and in the streets and public ways of the said City of Louisville without right: that they unlawfully occupy the streets of said City and are a common nuisance: and said defendant, the City of Louisville, threatens to, and will, unless restrained by the injunction of this Court, issue or cause to be issued criminal and penal warrants and indictments against the complainant, charging it with the occupation of the public streets and ways of said City without right or authority, both criminal and civil, for the purpose of preventing your orator from carrying on its said business: and the said defendant, City has asserted its right to employ direct physical force to remove your orator's appliances from the streets and highways of said City, and is threatening to do so: and thereby the complainant will be greatly and irreparably injured, and its property and business in the City of Louisville destroyed. Moreover, the passage of said ordinance casts a cloud upon your orator's title to the said franchise to do business in the City of Louisville, and to keep and maintain its appliances upon the streets and public highways of said city, and irreparably damages the business and credit of your orator, and the value and utility of its said property. And so your orator says that unless the defendant, the City of Louisville, shall, by the orders and decree of this court, be restrained from executing and enforcing said ordinance approved January 23, 1909, your orator will suffer great and irreparable injury and damage, and your orator prays as in the original bill, and will ever pray.

FAIRLEIGH, STRAUS & FAIRLEIGH,
WM. L. GRANBERY,
Counsel for Complainant.

103 STATE OF KENTUCKY,
County of Jefferson, ss:

The affiant, W. K. Boardman, says that he is Manager of the complainant in the City of Louisville, and is the chief officer of the complainant in the City of Louisville; and the President and Sec-

retary of said complainant are absent from said county; he says that the statements contained in the foregoing amended bill are true, as he verily believes.

W. K. BOARDMAN.

Subscribed and sworn to before me, this 3 day of March, 1909. My commission expires January 30th, 1910.

AILEEN B. MILLIKEN,
Notary Public, Jefferson County, Kentucky.

104 And on another day of said term of said court, continued and held, to-wit, on March 8th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

This cause having been heretofore submitted on the defendant's demurrers to the bill, and upon the defendant's exceptions to the bill for impertinance, and upon the complainant's motion for a preliminary injunction in accordance with the prayer of the bill; and the Court being now sufficiently advised thereof, delivered a written opinion, which is filed and made a part of the record; Accordingly it is now ordered, adjudged and decreed that the defendant's said exceptions to the bill be, and they are, each sustained, and the fourth, fifth and sixth paragraphs of the bill, except the last sentence of the sixth paragraph, be, and they are, each stricken from the bill as unnecessary to the statement of the claim to the relief sought by the bill.

It is further ordered, adjudged and decreed that the defendant's demurrers to the bill be, and they are, each overruled.

It is further ordered, adjudged and decreed that the complainant's motion for a preliminary injunction pendente lite, in accordance with the prayer of the bill, be, and it is, sustained.

It is therefore ordered that the defendant, the City of Louisville, its officers, agents, attorneys, employés, and each of them, and all other persons, be, and they are, hereby strictly enjoined and restrained from in any manner enforcing or undertaking to enforce against the complainant, the Cumberland Telephone & Telegraph Company, the provisions or any provision of an ordinance entitled "An ordinance confirming and ratifying Section 5 of an act

105 passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled, "An Act to incorporate The Ohio Valley Telephone Company, and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines

over, along and under any highway, street or alley in the City of Louisville," approved August 17th, 1886, and passed by the Common Council of the defendant, the City of Louisville, and approved by the Mayor of said city on the 23rd day of January, 1909; and from, in any way, under color of said ordinance, or any provision thereof, interfering with the property of the said Complainant, or in any way disturbing or interfering with any of its poles, wires, conduits or other appliances upon, in or under the streets, alleys and highways of the City of Louisville, or in any other way intefering with or disturbing the business of the said complainant which it is conducting in the said city; and from, in any manner, interfering with the complainant's right to conduct a telephone business in the said City of Louisville until the further order of the Court.

The Opinion above referred to is as follows:

106 United States Circuit Court, Western District of Kentucky.

CUMBERLAND TELEPHONE AND TELEGRAPH CO.
vs.
CITY OF LOUISVILLE.

Opinion.

The bill in substance avers that the plaintiff is a corporation organized under the laws of Kentucky; that the defendant is a municipal corporation also organized under the laws of that State; that on June 28th, 1883, a corporation known as the Cumberland Telephone and Telegraph Co. was organized under the laws of Kentucky, the charter of which was amended on December 21st, 1883, and again on May 14th, 1889; that on February 3rd, 1896, it accepted the provisions of the Constitution of Kentucky; that on June 8th, 1883, there was also incorporated under the laws of said State a corporation called the Great Southern Telephone and Telegraph Co., which, on August 16th, 1897, also accepted the provisions of the Constitution, and that thereafter, on March 8th, 1898, pursuant to the laws of Kentucky, said two corporations consolidated under the name of the Cumberland Telephone and Telegraph Co. The Bill also avers that by an Act of the General Assembly of the State of Kentucky, approved April 3rd, 1886, there was created a corporation named the Ohio Valley Telephone Co., which, on January 22nd, 1900, accepted the provisions of the Constitution of Kentucky; that on January 27th, 1900, the last named company and the Cumberland Telephone and Telegraph Co. consolidated under the name of the Cumberland Telephone and Telegraph Co., and that the capital stock of the last named company was fixed at $6,000,000, which, by successive amendments, was increased to $20,000,000. The bill also sets out in full the provisions of Section 5 of the Act of the General Assembly of Kentucky incorporating the Ohio Valley Telephone
107 Co., and avers that on August 17th, 1886, the defendant, through its legislative department, the General Council, and

with the approval of the Mayor, enacted an ordinance, the material parts of which for present purposes, are as follows:

"An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An act to incorporate the Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville.

"Whereas, The General Assembly of the Commonwealth of the State of Kentucky passed an act, entitled 'An act to incorporate The Ohio Valley Telephone Company,' which was approved on the 3rd day of April, 1886, section 5 of which said act is as follows:

" 'SEC. 5. The said company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the General Council of said city; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interests therein, equipments, rights of way, easements, servitudes, in the highways, streets and alleys in the city of Louisville, together with all of its properties, and when purchased or leased shall have power to maintain and operate same along, over or under the highways, streets and alleys of the city of Louisville; provided, however, that such telephone poles, lines and systems have heretofore been granted the right-of-way or easements in the highways, streets and alleys in the said city of Louisville by the General Council thereof. And the said company may also construct, equip and maintain telephone lines along, over or under the highways, streets and alleys, and across any water-course within this Commonwealth, so as not to obstruct the same; and said company may connect its lines with those of any other company on such terms as may be agreed on.'

"Therefore, be it ordained that the said act, in so far as it refers to the constructing, equipping, operating and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating and maintaining conduits and manholes; to laying pipes, cables, conductors and wires, and operating telephone wires, over, along or under the highways, streets and alleys in the city of Louisville is hereby ratified and confirmed and the right is hereby granted and confirmed to the said The Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires,

and operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the city of Louisville, provided—

* * * * * * *

"Seventh. As soon as practicable after the approval of this
108 ordinance, and before the said Telephone Company, its successors or assigns, shall be allowed to open any street, avenue, alley or sidewalk for the purpose hereinbefore stated, the said Telephone Company, its successors or assigns, shall execute a bond for the sum of $50,000, with good and sufficient security, in favor of the city of Louisville, conditioned that the said Telephone Company, its successors or assigns, shall hold the said city of Louisville harmless and free of all damage which may be caused by the opening of any street, avenue, alley or sidewalk for the purpose hereinbefore stated, said bond to be renewed from time to time, with such security as the General Council may require."

Various other provisions of the ordinance related to requirements as to the erection of poles and wires, the construction of conduits, the manner of opening streets and alleys, the manner of opening ground for various purposes, and other details not material to this case.

It is also averred that thereafter, on August 18th, 1886, the Ohio Valley Telephone Co. accepted said ordinance, and that a bond, as provided for in Section 7 thereof for $50,000, was executed and delivered to the Mayor of the city; that the bond was executed by the company with J. B. Speed and James Clark as sureties thereon, and was approved and accepted by defendant; that from the last named date until January 27th, 1900, the Ohio Valley Telephone Co. operated a telephone exchange over its poles, wires and cables, and through its conduits in the city, and its right to do so was recognized by the defendant; that since the consolidation last referred to the complainant, the Cumberland Telephone and Telegraph Co. operated its exchange and carried on its telephone business in the city of Louisville until in January, 1909, and at all times was recognized by defendant as being so legally and properly; that on April 7th, 1902, defendant, through its General Council with the approval of its Mayor, adopted an ordinance requiring the complainant in its own name to execute a bond for $50,000, as required by Section 7 of the ordinance of August 17th, 1886, and the complainant did so with the American Bonding and Trust Co. as surety thereon; that the bond so required was executed, delivered
109 and accepted by the defendant through its General Council, but that on January 22nd, 1909, the General council of the city with the approval of the Mayor enacted an ordinance in the following terms:

"An ordinance repealing an ordinance entitled 'an ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway street or alley in the city of Louisville, approved August 17, 1886.

"Be it ordained by the General Council of the City of Louisville:

"SECTION 1. That an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville,' approved August 17, 1886, be and the same is hereby repealed.

"SEC. 2. This ordinance shall take effect from and after its passage."

It is further averred that the defendant is now insisting that by virtue of the ordinance last above set forth the complainant is without right to occupy the streets, alleys and public places in the city with its poles, wires, conduits and other structures, and is unlawfully conducting a telephone business and operating an exchange in the city of Louisville. It is also charged that the last named ordinance was passed without any notice whatever to complainant of the defendant's intention to adopt the same; that it was adopted without any just cause and without assigning any just cause therefor to complainant or any one else, and that said city is threatening and will, unless restrained by the court, interfere with complainant's right to conduct a telephone business in the city, and will seek to deprive the complainant of its property in the city and of its right to occupy the streets, alleys and public places of the city with its poles, wires, conduits and other structures, and
110 complainant charges that said last recited ordinance seeks to impair, and unless its enforcement is restrained, will impair the obligation of the contract between the parties in violation of Section 10 of Article 2 of the Constitution of the United States, and will also deprive complainant of its property without due process of law, and will deny it the equal protection of the laws in violation of the 14th Article of Amendments to the Constitution of the United States.

The fourth paragraph of the bill sets forth in some detail the character of complainant's business here and in other States, its large investments for adequate equipment, the amount of its capital, its indebtedness, its rates of toll, and its income and earnings in Louisville.

In the fifth paragraph of the bill the complainant sets forth at length certain transactions with the Board of Trade of the city and the results thereof.

In the sixth paragraph complainant makes certain averments in respect to another corporation in Louisville which operates a telephone exchange and telephone lines in the city under a certain fixed schedule of tolls, and it is alleged that this brings certain injurious results to complainant which are set forth. The bill then makes averments as to how it has conducted its business in the city, and shows that the amount in controversy in this action exceeds in value the sum of $5,000 exclusive of interest and costs, and in paragraph 7 the complainant, besides asking for the issuance of a subpœna in due form, prays as follows:

"And your orator further prays that a provisional or preliminary injunction, restraining the said defendants, its officers, agents and employés, and all other persons, from any interference with the property of your orator, and any interference with its business in the city of Louisville, Kentucky; and that it be restrained and enjoined from taking any action or interfering in any manner with the right of your orator to erect and maintain its poles, wires, conduits, cables and other apparatus in the streets, alleys and public places in the city of Louisville, Kentucky, and from in any manner
111 interfering with or disturbing its vested rights, or from in any manner interfering with or seeking to impair the obligation of said contract; and from in any way interfering with or disturbing its business and right to conduct a telephone business in the city of Louisville, Kentucky.

"And your orator further prays that upon a final hearing, its right to conduct a telephone business in the city of Louisville, Kentucky, be declared and sustained; and that its rights secured under an act of the legislature of the Commonwealth of Kentucky, and ratified and approved by the city of Louisville, to erect and maintain its poles, wires, cables, conduits and other structures in the streets, alleys and public places of said city, be declared and adjudged a valid and subsisting contract, and that the provisional or preliminary injunction be made perpetual."

The defendant has filed exceptions to the fourth and fifth and also parts of the sixth paragraphs of the bill upon the ground that the allegations therein are impertinent. It has also filed a demurrer which challenges the jurisdiction of the court presumably (though it is not definitely shown) as a court of the United States, and the demurrer also insists that there is no equity in the bill.

Exceptions.

We think it was not intended by the complainant in those parts of the bill to which the exceptions relate to show that over $2,000

exclusive of interest and costs is in dispute, and we are clearly of opinion that those portions of the bill which are covered by the exceptions are in no way pertinent to any part of the relief sought. The exceptions will all be sustained, and the portions of the bill to which they apply will be stricken out as unnecessary to the statement of the claim to the relief sought by the bill.

It may be added that the purpose of the pleader in putting into the bill of averments to which the exceptions apply is not apparent. We suppose, however, that it was not the purpose thereby to show either that the jurisdictional amount is in dispute or that the Ohio Valley Telephone Co. and the complainant, upon the faith of the charter of the former company and of the city's consent thereto, has expended very large sums of money in this city and now had property here worth at least the sums thus expended which would be greatly and irreparably injured, if not destroyed,
112 if the repealing ordinance were enforced, but if we are mistaken in this the complainant may take leave to amend the bill so as to make clear and succinct statements in those respects. The court to any other extent is unable to see any sound reason for imposing upon the defendant the labor or duty of taking issue with the complainant upon the other phases of the paragraphs to which the exceptions relate.

The Demurrer.

The defendant states its ground of demurrer to the bill in this language:

"First. That it appeareth by plaintiff's own showing by the said bill that this court has no jurisdiction to try and determine the facts therein set forth and that by the plaintiff's own showing by the bill some other court of equity has proper jurisdiction.

"Second. That it appears by the plaintiff's own showing, by the said bill, that it is not entitled to the relief prayed by said bill against this defendant.

"Third. That said bill of complaint of the plaintiff is wholly without equity."

The objection that this court has not jurisdiction, but that some other court of equity has, as already indicated, seems to mean that this court, as a court of the United States, is without power to hear and determine the cause. The Judiciary Act now in force gives the circuit courts of the United States jurisdiction without regard to the citizenship of the parties "of suits of a civil nature where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arising under the constitution or laws of the United States."

The complainant claims that by virtue of the consolidations stated in the bill and by virtue of the provisions of the charters of the constituent companies and what was done thereunder, and particularly by virtue of what was done by the complainant and by the city under and pursuant to Section 5 of the Act passed by the State legislature incorporating the Ohio Valley Telephone Co., there is a

valid and subsisting contract between the complainant and
113 the defendant which the defendant cannot by its own legislative act abrogate or impair; that nevertheless it has undertaken by the ordinance of January 22, 1909, to nullify that contract, impair its obligations and destroy complainant's rights thereunder without complainant's knowledge or consent and without notice to complainant of such purpose prior to the passage of the ordinance; that having enacted the ordinance the city threatens to enforce it and will do so unless restrained by the court, and thereupon the complainant insists that this action of the legislative department of the city is an attempt, first, to impair the obligation of the contract; second, to deprive complainant by this legislative act of the city of its property without due process of law, and third, to thereby deny it the equal protection of the law, all in violation of the Constitution of the United States.

Sections 200 and 201 of the Constitution of Kentucky establish the right of telephone companies to consolidate, and Section 556 of the Kentucky Statutes contains a provision to this effect, towit:

"When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the rights, privileges, franchises, exemptions, property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

We cannot doubt, as the bill presents the case, that all the rights of the Ohio Valley Telephone Co. passed to the complainant upon their consolidation. Among these rights were, first, those conferred by Section 4 of its charter, which, applying to the entire State, is in this language, towit:

"Said Company shall have the power to purchase, construct, maintain, and operate, within this State and elsewhere, telephone lines, exchanges, and systems, and to conduct all the business incident and pertaining thereto and may purchase or acquire and dispose of real estate, machinery, apparatus, poles, wires, patents or interests
therein, licenses, rights, and franchises relating to such busi-
114 ness or to be used by said Company therefor; and said Company may manufacture or buy, sell, or lease any machinery, devices, patents, or interests therein, licenses and supplies."

And second, those which arose out of Section 5 above copied, and which, so far as the city of Louisville is concerned, made certain rights or acts of the company dependant upon the city's consent thereto, which consent was given over twenty-two years ago, and thereupon and upon faith thereof large sums were expended by the company in the city.

The charter of the Ohio Valley Telephone Co. was enacted by the legislature of the State, and over it we think the city of Louisville has now no control after having consented to the exercise of the rights given by Section 5, and the city cannot repeal it nor make

it ineffectual, at least so long as the complainant performs all its part of the contract. The legislature of the State undoubtedly has primary and paramount control and power over the streets, alleys and public places of cities and towns which are its creatures. This proposition needs no citation of authorities. (See Wilson vs. Midway, 4 Ky. Law Rep. 727). This control may be exercised directly, or, as is usual, it may in whole or in part be delegated to the municipalities as agencies.

When the legislature enacted the charter of the Ohio Valley Telephone Co. the State itself thereby exercised the power of control, but by Section 5 it made the exercise by the company of certain rights and powers within the city of Louisville dependent upon the consent of the city thereto. Under this Section the city might consent or by not consenting might defeat its provisions. The city by an ordinance duly enacted in form "granted" certain rights to the company, but upon the language of the ordinance and the preamble thereto the construction is inevitable, and we have accordingly construed it to mean that the city, pursuant to the power given by the charter of the company "consented" to a provision which we may properly say was referred to it for its approval or non approval by the provisions of Section 5. This consent, which covered all the authority delegated to the city, was given upon certain prescribed conditions. Without questioning the right of the city to annex conditions to its consent, the Ohio Valley Telephone Company and the complainant in turn accepted them, and have complied with and performed all of them. Promptly after the consent was given and upon faith thereof, the company began to expend and for 20 years has continued to expend large sums of money in the erection and maintenance of the structures, etc., necessary to the conduct of an extensive telephone business as a public utility in the city. These facts not only appear to constitute a valid consideration for the contract, but, while not so pleaded, are strongly suggestive of an estoppel. But however that may be we think that when the city gave its consent, and when acting thereon the telephone company complied with and performed all the conditions annexed to that consent, the rights and powers given the city in the premises were thereby exhausted and became functus officio, and thereupon the city's right to exclude the company by a failure to consent was gone, and the right of the company to remain became unalterable by the action of the city alone. The act of the State legislature gave to the city no power express or implied to recede from its consent when once given and fully acted upon and when the other party was in no way in default. The act indeed did give the city, as agent, pro hac vice, of the State, the right and the option to prevent the entrance of the company into the city by withholding its consent thereto, but it gave no power after the city had once consented and after the conditions it had annexed to that consent had been fully complied with and acted upon to withdraw that consent and by such withdrawal practically to repeal a charter which had been granted by the State. "If the charter is silent about a power it does not exist" is the language of the Supreme Court in Blair vs.

Chicago, 201 U. S. 472, citing The Binghampton Bridge case, 3 Wallace 75.

116 Our views in this connection may be illustrated by supposing that the State should give the city power to issue bonds provided the General Council should consent thereto, and that such consent was given in due form and the bonds issued and sold, could a subsequent repeal of that consent destroy the validity of the bonds? It would be difficult to find a decision in the affirmative.

Upon all the facts shown we think that the legislation embraced in the charter of the Telephone Co. became a law of the State over which the State alone could therafter exercise control either through the legislature or by further delegation of power to the city. It must be true that State legislation can not be repealed nor altered by a city council unless express authority is delegated by the legislature to do that very thing. See City Ry. Co. vs. Citizens R. R. Co., 166 U. S. 563. It is contended that Sections 163, 164, 156, 166, 190 and 199 of the State constitution and Sections 2742 and 2783 of the Kentucky Statutes give such authority, but a careful and critical examination of each of those Sections has led to the conclusion that they do not support the contention, as neither one nor all of them meet this particular case. Most probably the laws and constitution of Kentucky reserved the right of the legislature to amend, alter or repeal this and all other corporate charters, and that body might, we presume, if thinking it wise and just, repeal the complainant's franchise and charter, whether it injured complainant or not; but whatever the State legislature might do, we are of opinion that the provisions of Sections 4 and 5 of the charter of the Ohio Valley Telephone Co., the consent thereto by the city, the ordinance to that effect and the bonds executed to the city, as between the latter and the complainant, and the other facts of the case, made and constituted a contract which the city, acting alone, cannot nullify, nor validly do anything through its legislative body in respect thereto which will impair the obligation of the

117 contract made with the sanction of the State, in order that there might be inaugurated and promoted a useful public utility. That there was a contract thus made between the parties to this action we think is established by cases like

Detroit vs. Detroit Citizens St. Ry. Co., 184 U. S. 386,
City Railway Co. vs. Citizens St. Ry. Co., 166 U. S. 563,
Wo[illegible]vs. New Orleans, 103 U. S. 366-7,
Von Hoffman vs. City of Quincy, 4 Wallace 554.

We conclude that the claim made by the bill is not a colorable or frivolous one (166 U. S. 564), and that there is not only a fair but a sound basis for the contention that this action is one which arises under the construction and laws of the United States within the meaning of the Judiciary Act.

Jetton vs. University of the South, 208 U. S. 498,
Illinois Central R. R. Co. vs. Adams, 180 U. S. 35,
Walla Walla vs. Walla Walla Water Co., 172 U. S. 7,

And if this be true the court has jurisdiction of the case and may decide any question involved in the litigation. Fallbrook &c. vs. Bradley, 164 U. S. 154-6 and cases cited.

Furthermore, as we have seen, the ordinance giving the consent of the city to the charter of the Ohio Valley Telephone Co. annexed various conditions, including one which exacted a bond from the Ohio Valley Telephone Co. and afterwards a bond from the complainant. In this way the rights of the city, so far as the bonds applied, were guarded, and upon these bonds the city has its remedies. Neither in the ordinance of January 22, 1909, nor otherwise is there in the record any intimation that any obligation of the complainant as fixed by the bonds or by the ordinance by which the city consented to the company's charter, has in any wise been violated by the complainant, and it would seem that until something of that character has been done it would be a mere exercise of arbitrary power for one party to the contract to annul it or undertake to do so without making any complaint to or demand upon the other party, and without giving it any notice or opportunity to be heard or to understand what complaint the city had
118 against it. Besides, if there has been any violation by the complainant of its duties or obligations to the city the only available remedy outside of an appeal to the State legislature would be a suit upon the bond or some other appropriate judicial proceeding relative to duties not covered by the bond. By what was done in the premises by the State legislature and by the city when it gave its consent thereto, it was no doubt intended to provide a State charter for the company. No power was given the city to repeal that charter or any franchise thereby and with the consent of the city, conferred upon the telephone company. Withdrawing the consent of the city by the ordinance of January 22, if valid, would effectually repeal the company's charter as to Louisville, and if invalid it is an attempt by the city legislature to impair the contract between the parties. This would not only put a cloud upon complainant's title to do business in the city but would greatly and irreparably injure its property.

It results that the first demurrer, which is based upon the ground that this court, as a court of the United States, has not jurisdiction of the case, must be overruled. We think it has jurisdiction as a court of the United States and also, as we shall see, as a court of equity.

The second and third grounds of demurrer seem, in effect, to be the same and to demand the judgment of the court as to whether there is equity in the bill—in other words, whether the bill states a cause of action in equity. This, in one at least of its most important phases, must depend upon whether the complainant would have at law a plain, adequate and complete remedy. Most of what has been said in discussing the first ground of demurrer is applicable to the others. We have ascertained that there is a contract between complainant and defendant. Obviously it relates to most important and probably very complex matters. The city, apparently
119 without legislative authority, is attempting by some exercise of sovereign power and as an agency of the State, to

destroy the contract by its own act without notice to the complainant and without its consent. It is admitted that the city, pursuant to the ordinance, is threatening to prevent any exercise by complainant of its right under the contract. As such must have been the intention of the city, it is fair to presume, from the enactment of the repealing ordinance, that it is the purpose of the city to enforce it. This necessarily involves a stopping by the city of complainant's widely extended local operations greatly to its injury. Under such circumstances we think it too obvious to require discussion that there is no plain and adequate remedy at law, and that upon well established principles relief may be sought in equity.

At all events, assuming the averments of the bill as amended to be true, we think it shows a claim to relief in equity, and the second and third grounds of demurrer are also overruled.

Motion for a Temporary Injunction.

Upon considering the bill when it was filed the court entered a restraining order, and the complainant has moved for a temporary injunction pendente lite. At the hearing of this motion the bill of complaint which is sworn to was, with its exhibits, read as testimony in support of the motion. No testimony was offered in behalf of the defendant. Assuming that we have been correct in the conclusions already reached and stated, and also assuming that the uncontradicted testimony heard on the motion is true, we think it is fair, expedient and just to preserve the present status until there can be a full presentation and determination of the case. Otherwise great injury, not to say inconvenience, might come to a business and property like those affected by the ordinance complained of, and it may be well to remember that there would come also great inconvenience to the public in the interruption of
120 its facilities for telephone communications.

The case of McChord vs. L. & N. R. R. Co., 183 U. S. 483, was not referred to by counsel at the argument but it may be well to distinguish that case from this. The State Railroad Commission being authorized by an act of the legislature under certain conditions to establish rates to be charged by certain common carriers threatened to do so. The power to fix rates, it has been clearly settled, is legislative in character. The rates had not been made by the Commission, though it was threatening to make them. As there had not, in that case, been legislative action in the premises, and as it is entirely clear that legislative action can not properly be enjoined in advance, an injunction was refused. In the case now before us the city, by enacting the repealing ordinance, has taken legislative action, and the proof shows that it threatens at once to enforce it, and will do so unless restrained. The McChord case, we think, does not apply.

It results that the motion for a temporary injunction pendente lite must be sustained.

March 8th, 1909.

WALTER EVANS, *Judge.*

121 And on another day of said term of said court, to-wit, April 5th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

This day came the defendant, the City of Louisville, by Clayton B. Blakey, its counsel, and, by leave of court, filed its Answer herein.

The Answer above referred to is as follows:

122 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky, at Louisville.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Answer of the City of Louisville to the Bill of Complaint.

I.

The defendant, the City of Louisville, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, comes and answers thereto, or to so much thereof as it is advised is material to be answered, and says that it is true as stated in Paragraph One of said Bill of Complaint that the Cumberland Telephone & Telegraph Company was incorporated under the laws of the Commonwealth of Kentucky as stated in the bill, and that the amendments to said charter were duly and regularly made as charged in said bill.

Defendant also admits that the Great Southern Telephone & Telegraph Company was incorporated under the laws of the Commonwealth of Kentucky, as charged in the bill, and that said complainant company and said Great Southern Telephone & Telegraph Company were thereafter consolidated as charged in the bill.

Defendant admits that the Ohio Valley Telephone Company was created by an act of the General Assembly of the Commonwealth of Kentucky, as charged in the bill, and that said company was
123 thereafter consolidated with the complainant company, as charged in the bill.

Defendant admits that an ordinance was approved by the General Council of the City of Louisville on August 17, 1886, as charged in the Bill of Complaint, and that said ordinance is in substance the same as that set out in the Bill of Complaint.

Defendant admits that the directors of the Ohio Valley Telephone Company accepted said ordinance and gave the bond referred to in

the bill, and that said The Ohio Valley Telephone Company furnished the Mayor of the City of Louisville an official copy of the proceedings of said meeting, as charged in the bill.

Defendant admits that Hon. P. B. Reed, Mayor of the City of Louisville, addressed the letter referred to in Paragraph 2 of the bill, dated September 4, 1886, to W. H. Newman, Secretary of The Ohio Valley Telephone Company, as charged in said bill.

Defendant admits that continuously from said time to the 27th of January, 1900, said The Ohio Valley Telephone Company operated a telephone exchange in the City of Louisville, and that said The Ohio Valley Telephone Company was recognized by the City of Louisville as legally occupying the streets, alleys and public places of the City of Louisville with its poles, wires, cables and other apparatus, as charged in the bill, and admits that from the consolidation of said The Ohio Valley Telephone Company with complainant company on the 27th day of January, 1900, the said complainant company has been continuously, and is now, occupying the streets, alleys and public places of the City of Louisville with its wires, cables, conduits and other apparatus and structures, and has continuously, and is now, engaged in operating a telephone exchange or plant in the City of Louisville.

Defendant admits that it has at all times until January, 1909, recognized the said company as legally and lawfully occupying the streets and other public places with its structures and operating its plant in the City of Louisville.

Defendant admits that on April 7, 1902, the General Council adopted an ordinance requiring the complainant company to execute bond as set out in the bill, and admits that said com-
124 plainant company did execute such bond as charged in the bill; admits that on June 7, 1902, the General Council passed a resolution approving said bond, as charged in the bill.

Defendant says that it has no knowledge or belief as to whether the complainant has renewed said bond, or any bond, in favor of the City of Louisville since April 7, 1902, as often as requested by the proper authorities of the City of Louisville, but demands strict proof of the truth of said charge.

II.

For further answer, defendant says that it is true, as stated in Paragraph 3 of the Bill of Complaint, that the General Council of the City of Louisville did, in the month of January, 1909, adopt an ordinance which was on January 23, 1909, approved by the Mayor of the City of Louisville, which ordinance repealed an ordinance of the General Council of the City of Louisville, approved on the 17th day of August, 1886, as set out in the Bill of Complaint.

Defendant admits, and now insists and charges, that it is true that by virtue of said ordinance approved on January 23, 1909, complainant is without right to occupy the streets, alleys and public places of the City of Louisville with its poles, wires, conduits and other structures, and says that it is true and charges that said com-

plainant is unlawfully and illegally conducting a telephone business and operating an exchange in the City of Louisville.

Defendant says that it is not true that said ordinance was passed without any notice to complainant of the intention of the City of Louisville to adopt same; says that it is not true that said ordinance was adopted without any just cause, or without assigning any just cause to the complainant.

Defendant denies that it seeks to deprive, or in any manner will deprive the complainant of its property in the City of Louis-
125 ville, and denies that said ordinance seeks, or that the defendant, in any manner, seeks to impair, or in any manner will impair, the obligation of the complainant's contract with the City of Louisville, or any contract with the City of Louisville, in violation of Section 10 of Article 2 of the Constitution of the United States, or of any other provision of the Constitution of the United States. Defendant says it has no contract with complainant company.

Defendant, therefore, says the enforcement of said ordinance should not be restrained.

Defendant denies that said ordinance, or any act on the part of the defendant, will deprive complainant of its property without due process of law, or that any such ordinance, or any act on the part of the defendant, will deny to complainant the equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, or in violation of any provision of the Constitution of the United States.

III.

For further answer to said Bill of Complaint, defendant says that the complainant company has been conducting and operating a telephone system in the City of Louisville for many years; that its policy since it began to operate such telephone system has been dictatorial, arbitrary and offensive to the citizens of Louisville; and without any regard for the City of Louisville or its citizens; and instead of furnishing to citizens of Louisville the best service possible at the lowest price consistent with business principles, complainant has pursued the policy of furnishing to the citizens of Louisville the very poorest service which said citizens would tolerate, and charging them the very highest rate it could extort from them; that in 1901 the telephone service furnished by said company became so unsatisfactory that certain citizens of Louisville procured from the General Council of the City of Louisville a fran-
126 chise to operate another telephone system in the City of Louisville; that since the said second telephone company has been operating in the City of Louisville the complainant company has pursued a policy which has given even more dissatisfaction to the citizens of Louisville than its former policy; that the policy so pursued and now pursued by said complainant company is in substance as follows:

Said complainant company has a substantial monopoly on all long distance service in and around Louisville on account of its connection with the American Bell Telephone Company. All cus-

tomers of the complainant company who are compelled for business reasons to have long distance connections with customers outside of the City of Louisville are compelled to pay the highest possible price for their telephone service and the rates charged have been gradually increased on all such customers. To all customers who do not require long distance service said complainant company will furnish and does furnish a telephone of the same character as above mentioned at a much less rate, and, in many instances, furnishes such telephone service for a nominal charge only; that the result has been that many customers and citizens of Louisville are charged rates at less than the cost of the service furnished, thereby imposing on the customers of said complainant company who are so situated as to require the service of the complainant's long distance connections the necessity of paying the complainant company's losses in trying to crush out competition.

Defendant says that the situation above detailed became so burdensome to some of the citizens of the City of Louisville that the Mayor and General Council of the City of Louisville attempted in the year 1908 to remedy the situation by passing an ordinance authorizing the sale of a franchise for a comprehensive system of telephones in the City of Louisville, which, it was hoped by the Mayor and General Council of the City of Louisville, would result in one comprehensive system of telephones, with the right to charge such uniform rates as would be fair and just to all citizens, and at the same time permit the company acquiring such franchise to
127 operate its system of telephones and obtain a fair return on its investment.

Defendant says that said ordinance was prepared by the City Attorney of the City of Louisville, upon request of the Mayor; that it was introduced in one of the Boards of its General Council and passed said Board by practically a unanimous vote, and was favorably reported to the other Board of its General Council and would have been adopted by said Board and approved by the Mayor but for the fact that the complainant company, through its President and attorneys, appeared before the Mayor of the City of Louisville, and before the Board of Aldermen of the City of Louisville and stated to said Mayor and to said Board of Aldermen that the complainant company had a franchise which was irrevocable and irrepealable, and that the City of Louisville was powerless to interfere with the rights of the complainant company in the conduct of its business or otherwise in the City of Louisville, and said officials and attorneys for said company further stated in unequivocal terms to the Mayor and Board of Aldermen of the City of Louisville that it, the said complainant company, would not become a bidder at the sale of such a franchise, or in any manner acquire, or attempt to acquire, the franchise which by said ordinance was proposed to be sold.

Defendant says that by one of the provisions of said ordinance, viz: Clause 16, it was proposed to repeal the ordinance which was approved on August 17, 1886, referred to in the Bill of Complaint, and that said repealing clause of said ordinance was in substance the same as the repealing ordinance referred to in Paragraph 3 of the

Bill of Complaint. Defendant files a copy of said proposed ordinance herewith and makes same a part hereof, marked "Exhibit A."

Defendant, therefore, says that inasmuch as the defendant, at the time it first proposed to repeal the ordinance under which the complainant claims its right to conduct its business in the City of Louisville, proposed at the time to offer for sale a franchise similar in nature to that now exercised by the complainant company, and inasmuch as the complainant refused to become a purchaser
128 or to acquire the franchise so proposed to be sold, said Board of Aldermen declined to pass the ordinance above mentioned, and, in lieu thereof, passed the ordinance complained of in the Bill of Complaint, being the ordinance referred to in Paragraph 3 of the Bill of Complaint.

Defendant says that in connection with the repealing ordinance referred to in Paragraph 3 of the complaint, which was recommended to the General Council of the City of Louisville for passage by the Mayor of the City of Louisville, said Mayor sent with the said ordinance a written recommendation, which recommendation was in part as follows:

"As to the repealing ordinance, it may be said that it is unjust to the Cumberland Telephone Company to repeal the ordinance under which it obtained its right to do business in the City of Louisville, and not at the same time pass an ordinance authorizing the sale of a similar right or franchise, in order that the Cumberland Telephone Company might have an opportunity to purchase such a similar right or franchise.

In answer to this contention, I have to say that an ordinance repealing the ordinance which granted to the Cumberlannd Telephone Company its right to do business in the City of Louisville, and at the same time ordering the sale of a similar right or franchise was introduced in the lower board of the General Council, but while that ordinance was pending, and before it was put upon its final passage, the Cumberland Telephone Company, through its President, and through its attorneys, at a public meeting held by the General Council for the purpose of considering the ordinance in question, stated unequivocally that it would under no circumstances bid for such a franchise, and that the Cumberland Telephone Company did not care to purchase any similar franchise at this time. It, therefore, seems to me that there is no occasion to pass an ordinance authorizing the sale of such a franchise until it is determined that the City has a right to repeal the ordinance under which the Cumberland is now acting, and I take it for granted that the General Council would at the proper time, upon the request of the Cumberland Telephone Company, offer for sale a franchise which would be fair and just to the Cumberland Telephone Company and its patrons."

Defendant says that it is the purpose of the General Council of the City of Louisville, and of the Mayor of the City of Louisville, to offer for sale a franchise of a nature similar to that heretofore

exercised by the complainant company whenever said complainant company desires to purchase such a franchise.

Defendant says, moreover, that under the laws of the State
129 of Kentucky the City of Louisville can be compelled to offer for sale such franchise of a similar nature, upon the request of the complainant company.

IV.

Defendant says that on the 2nd day of July, 1883, a corporation known as Ohio Valley Telephone Company was organized with Jas. Clark, J. B. Speed, W. H. Johnson, W. H. Mundy and H. N. Gifford as its incorporators; that thereafter said Ohio Valley Telephone Company was granted permission by the General Council of the City of Louisville to construct, equip and operate a telephone system in the City of Louisville for the period of twenty-five years from and after the 26th day of January, 1884; that said Ohio Valley Telephone Company accepted the provisions of said ordinance, and, pursuant thereto, constructed, equipped and operated for a period of more than two years a telephone system in the City of Louisville; a copy of the ordinance of January 26, 1884, granting to said Ohio Valley Telephone Company said right is filed herewith and made a part hereof, marked "Exhibit B."

That pursuant to the terms of said ordinance said Ohio Valley Telephone Company constructed its poles, wires, and telephone plant in the City of Louisville, and that thereafter it executed bond to the City of Louisville as required by said ordinance, and did all of the things it was required to do under the terms of said ordinance as above set out; that thereafter, to-wit, on the 3rd day of April, 1886, the incorporators and stockholders of the said Ohio Valley Telephone Company procured a charter from the Legislature of Kentucky, wherein and whereby said incorporators were authorized as a body corporate under the name of The Ohio Valley Telephone Company to continue to conduct such telephone business in the City of Louisville by and with the consent of the City of Louisville; that such consent was given by an ordinance approved August 17, 1886; that said incorporators acting under the name of Ohio
130 Valley Telephone Company were then operating a telephone system and doing all the things and matters required of them to do or to be done under the name of The Ohio Valley Telephone Company, and that by the ordinance of August 17, 1886, said The Ohio Valley Telephone Company was not required or bound to do anything further or in addition to those things which it was required and bound to do under the ordinance of January 26, 1884.

Defendant says that The Ohio Valley Telephone Company by its grant as contained in said legislative charter, and under the ordinance of August 17, 1886, did not acquire any right or privilege which it did not already own and possess, and that said The Ohio Valley Telephone Company and its incorporators and stockholders were not required to do anything or forbear anything of value to or in the interest of the City of Louisville by reason of said ordinance of August 17, 1886, which it was not already bound to do, or for-

bear by virtue of the ordinance of the 26th day of January, 1884, and defendant says that no contract was made by said ordinance of August 17, 1886, and no consideration passed from said The Ohio Valley Telephone Company to the City of Louisville under and by virtue of said ordinance sufficient to uphold a contract by and on behalf of the City of Louisville, and in fact no consideration whatever; and defendant further says that before the expiration of the twenty-five-year franchise or privilege granted to the Ohio Valley Telephone Company, as herein set out, and before the said The Ohio Valley Telephone Company or its successors or assigns could acquire any right thereunder, that said ordinance of August 17th, 1886, was repealed by the General Council of the City of Louisville.

V.

Defendant, for further answer to the Bill of Complaint, says that complainant, under its charter and under an Act of the Legislature approved on the 3rd day of April, 1886, and which is more specifically referred to in the Bill of Complaint, acquired only the
131 right, if it acquired any right at all, to operate its telephone system in the City of Louisville by and with the consent of the City of Louisville; that the City of Louisville had no authority by virtue of said act or by virtue of any act of the Legislature or otherwise to make a contract with the complainant company of any nature whatever, and defendant, says that if the said City of Louisville did make any contract with the complainant company, that it exceeded its authority in so doing, and that such contract, if so made, was null and void.

Defendant says that the only authority it had by virtue of the Act of April 3, 1886, above referred to, and by virtue of any law then in force, was to give its consent for said The Ohio Valley Telephone Company to operate its system of telephones in the City of Louisville; that said Company has ceased to operate its system of telephones in the City of Louisville, and that this defendant has exercised its option and has withdrawn from the assignee of the said The Ohio Valley Telephone Company the consent which it gave to said company to operate a telephone system in the City of Louisville, and that, therefore, the complainant company, as such assignee of The Ohio Valley Telephone Company, is now operating its system of telephones in the streets of the City of Louisville without right and without authority of law.

VI.

Defendant says that it is not true that any interference with the complainant's property in the City of Louisville would cause complainant any irreparable injury or damage, or any injury or any damage, and denies that the City authorities of the City of Louisville or this defendant will, unless restrained, or will at all, injure, destroy or otherwise interfere with or will irreparably, or at all, damage or interfere with complainant's property in the City of Louisville, or will irreparably damage, or at all, damage complainant's property or business in the City of Louisville.

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VII.

For further answer herein, and especially for answer to the amended bill, defendant denies that the said The Ohio Valley Telephone Company purchased any material or constructed any telephone system or telephone line or equipment in the City of Louisville in reliance upon the ordinance of August 17, 1886, or in reliance upon the obligation and contract made by said ordinance, or any contract with this defendant, or that in reliance upon said ordinance or said contract said The Ohio Valley Telephone Company furnished all citizens of the city who desired telephone facilities as charged in the amended bill, but admits that said The Ohio Valley Telephone Company did maintain a telephone system in the City of Louisville until the making of the articles of consolidation stated in the original bill.

Defendant admits that the complainant carries on its poles and in its underground conduits fire alarm and police wires of the defendant free of charge, but denies that the same is done under any contract between the City of Louisville and The Ohio Valley Telephone Company, and defendant will remove its wires from the property of the complainant whenever requested so to do.

Defendant denies that there has been expended more than $1,700,000.00 on complainant's property in the City of Louisville; denies that said expenditure was made in reliance upon the said ordinance of August 17, 1886, or any contract created by said ordinance.

VIII.

For further answer to said amended bill, and especially for answer to Paragraph 2 of said amended bill, defendant admits that said ordinance of January 23, 1909, was passed and approved without the consent of the complainant, but denies that said complainant protested against the passage or approval of said ordinance.

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IX.

For further answer to said amended bill, and especially for answer to Paragraph 3 thereof, the defendant admits that it will employ criminal and civil process of the courts, if necessary, to prevent the complainant from conducting a telephone business in the City of Louisville, unless said complainant sees fit to acquire a franchise in the City of Louisville; but denies that said City has asserted its right to employ direct physical force to remove complainant's appliances from the streets of the city, and denies that it is threatening to do so, and denies that thereby, or at all, the complainant will be greatly and irreparably injured, or that its business and property in the City of Louisville will be destroyed.

Defendant denies that said ordinance or any act on the part of the defendant irreparably, or at all, damages the business and credit of the complainant, or the value or utility of the property.

X.

Having thus made full answer to all the matters and things contained in the bill, this defendant prays to be dismissed hence, with its costs in this behalf expended.

CITY OF LOUISVILLE,
By CLAYTON B. BLAKEY,
HUSTON QUIN,
W. O. HARRIS,
Counsel for Defendant.

Exhibits "A" and "B" with answer, are as follows:

134 EXHIBIT "A."

EXHIBIT "A" WITH ANSWER.

No. —. Series 1908.

An Ordinance Creating a Franchise for a Comprehensive Telephone System in the City of Louisville and Providing for the Sale Thereof and Repealing Certain Ordinances Granting the Right to Use the Public Ways for Telephone Purposes and Regulating Charges for Telephone Service.

135 No. —. Series 1908.

An ordinance creating a franchise for a comprehensive telephone system in the city of Louisville and providing for the sale thereof and repealing certain ordinances granting the right to use the public ways for telephone purposes and regulating charges for telephone service.

Be it ordained by the General Council of the City of Louisville:

SEC. 1. That there shall be sold to the highest and best bidder for a term of twenty years, the franchise or privilege to construct, purchase, or otherwise acquire, and to maintain and operate a telephone system for public and private use in the City of Louisville, which franchise or privilege shall include the right of way over, along, under, through and in the streets, avenues, alleys, lanes, parks, squares, bridges and other public places in said city, for the purpose of erecting, constructing, maintaining and operating, whether overhead or underground, poles, wires, manholes, subways and other equipment necessary or convenient for the construction and operation of such telephone system, and the right to extend such system from time to time during the existence of this franchise or privilege herein ordered to be sold; all of which shall be in accordance with the conditions, terms and limitations of this ordinance.

136 SEC. 2. That it shall be the duty of the Board of Public Works, as soon as practicable after the passage of this ordinance, to offer said franchise or privilege for sale at public auction

to the highest and best bidder at the front door of the City Hall, on Sixth Street, in the City of Louisville, Kentucky, after having given notice of the time, place and terms of said sale by advertisement for fifteen (15) days in the two daily newspapers elected to do the public advertising of the city, the first publication in each of said papers to contain this ordinance in full, and the subsequent publications need not contain the ordinance in full, but may refer to the first publication for the terms of said ordinance, and said Board shall accept the highest and best bid therefor and report the same to the General Council for its appproval, and the General Council shall have the right, for and on behalf of the city, to reject any and all bids for said franchise or privilege, and in case the bid reported by the said Board shall be rejected by the General Council, it shall be the duty of the Board of Public Works to immediately proceed, after advertising as herein provided, to again sell said franchise from time to time in the manner and under the regulations herein provided until a sale of the franchise herein offered shall be made and approved. Said sale shall be for cash, to be paid by the purchaser within fifteen (15) days after the sale has been so approved by the General Council, and upon the payment of the purchase price and the execution and approval of the bond hereinafter required the franchise or privilege provided for herein shall immediately
137 vest in such purchaser and continue for a term of twenty (20) years thereafter.

SEC. 3. That no bid for said franchise or privilege shall be received by the Board of Public Works for less than Twenty Thousand ($20,000) Dollars, nor unless the bidder shall before making his bid deposit with said Board a check for Ten Thousand ($10,000) Dollars, certified to be good by a bank doing business in the City of Louisville, which check shall be payable to the City Treasurer, and in case the bid shall be accepted the proceeds thereof shall be credited upon the amount of the purchase price, and if said bid be not accepted, then said check shall be forthwith returned to the unsuccessful bidder.

SEC. 4. That within ninety (90) days after the approval of said sale by the General Council the purchaser of said franchise or privilege, if he have not already a system of telephones in operation in the City of Louisville, shall begin in good faith upon the work of constructing said telephone system, and shall thereafter in good faith proceed continuously to the satisfaction of the Board of Public Works with such construction, and in any event such purchaser, his successors or assigns, must have complete and ready for operation in the City of Louisville within two years after the approval of the sale herein provided for, a first-class, modern telephone plant, with an immediate capacity for operating not less than five thousand telephone lines, a party line to count but one, including in said plant underground and aerial lines of the number aforesaid, and an exchange and central energy switch board, ready and equipped
138 for five thousand such lines, with the right to add to such plant from time to time as business may require.

In case of failure to comply with this section of the ordinance the

franchise herein ordered to be sold shall ipso facto become null and void; in which event it shall be the duty of the Board of Public Works to proceed, after proper advertisement as herein required, to again advertise and sell said franchise as provided in Section 2 hereof, and so to proceed from time to time until such a system as is herein provided for shall be secured.

SEC. 5. That any person acquiring said franchise or privilege may assign or transfer the same, but only on the express condition that such assignee or transferee shall be bound by all of the terms and conditions of this ordinance.

SEC. 6. That all work upon said telephone system, either in the construction or maintenance, so far as same is in the public highways and places of the City of Louisville, shall be under the supervision of the Board of Public Works and shall be controlled by the provisions of an ordinance of the City of Louisville, entitled, "An ordinance concerning telegraph, telephone and electric light and power wires in the City of Louisville," approved June 18, 1906, so far as applicable and so long as said ordinance continues in force, and the right is reserved to said Board upon reasonable notice to order and require the removal of any pole, and upon the failure of the owner or operator of such system to comply with said order and requirement said Board shall have the right to require such pole to be removed at the cost of such owner or operator.

All the underground conduits and ducts used in the con-
139 struction of said plant shall be so erected and constructed as not to interfere with or disturb underground structures, conduits, pipes, sewers, or other property belonging to the City of Louisville, and nothing contained in this ordinance shall preclude the City of Louisville from prosecuting or authorizing any public work of any character; and if any conduits, ducts, poles or other structures of the owner of this franchise shall obstruct or interfere with the prosecution of said public work or improvement, the City shall have the right, if it deems necessary, to require the removal of the same to some other location, and the same shall be so removed by the purchaser or owner of said franchise or privilege within a reasonable time upon the order of the Board of Public Works; and in case of failure on the part of said owner to comply with any such order, then the said Board may make such removal or change at the cost of said owner.

SEC. 7. That the owner or operator of said franchise shall in its conduits provide, at least, one duct for the use of the City of Louisville in laying and placing the wires for its fire alarm and police patrol system therein, and said ducts shall be for the exclusive use of the City of Louisville for said purposes. And such owner or operator shall also provide space upon its poles for the carrying of such wires, all of which shall be provided without charge to the City of Louisville, and the owner or operator of said franchise shall place the said wires in said conduits and on said poles without cost to the City of Louisville, except for the material, all of which shall be furnished by said city. But the said wires for the exclusive use of

the City of Louisville shall be so placed as not to interfere
140 with the effective operation of either said telephone system or said fire alarm and police patrol systems.

SEC. 8. That whenever it shall be necessary to disturb the streets, alleys, or sidewalks, or other public ways in the construction, repair, or maintenance of the subways, conduits, poles, or other appliances of said telephone company, the said streets, alleys, sidewalks, or public ways shall be restored under the supervision of the Board of Public Works to their former good condition, at the expense of the owner or owners of said telephone system, which expense shall include the cost of such supervision, and all rubbish shall be removed from the streets, alleys, sidewalks, or other public ways, where the same have been disturbed, as promptly as possible.

SEC. 9. That the rents to be charged by the owner or operator of said telephone system during the first ten years of the existence of this franchise shall not exceed the following schedule, namely:

For a single line business telephone not more than Six ($6.00) Dollars per month. For a party line business telephone not more than Three and Fifty-one-hundredths ($3.50) Dollars per month. For a single line residence telephone not more than Three ($3.00) Dollars per month. For a party line residence telephone not more than Two ($2.00) Dollars per month.

That the rents to be charged by the owner or operator of said telephone system during the last ten years of the existence of this franchise shall not exceed the following schedule, namely:

For a single line business telephone not more than Seven
141 ($7.00) Dollars per month. For a party line business telephone not more than Four ($4.00) Dollars per month. For a single line residence telephone not more than Three and Fifty-one-hundredths ($3.50) Dollars per month. For a party line residence telephone not more than Two and Fifty-one-hundredths ($2.50) Dollars per month.

Such owner or operator shall also have the right to establish, maintain and operate public pay stations.

SEC. 10. That the apparatus, instruments, switch boards, appliances and equipment of said system shall be composed of the most modern and approved type, and all switch boards shall be maintained during the period and existence of this franchise with the best practical equipment and the telephone service shall be first class in all respects and continuous and unlimited for twenty-four hours in every day during the entire life of this franchise except interruptions from unavoidable causes.

SEC. 11. The owner or operator of said franchise shall provide and furnish for the use of the City of Louisville, free of charge, twelve (12) telephones, to be placed in such public offices or institutions within the City of Louisville as may be designated by resolution of the General Council, and any additional telephones so provided and furnished to the City of Louisville shall be paid for by the City at the rate of twenty-five per cent less than the charge imposed upon other business telephones.

SEC. 12. That when the owner or operator of said franchise

or privilege shall have in use within the City of Louisville six thousand instruments (not counting extension telephones)
142 furnishing telephone service to six thousand persons, firms or corporations, then the said owner or owners of said telephone plant or system shall pay to the City of Louisville, in addition to all municipal taxes, the sum of One Dollar per annum for each such additional telephone service or instrument in excess of six thousand, which payments shall be made semi-annually on January 1st and July 1st of each year to the City Treasurer, and it shall be the duty of the owner or operator of said franchise or privilege on the first days of January and July of each year to make a report to the City Comptroller, which shall be in writing and sworn to before the chief officer or general manager of said telephone system, setting forth the number of patrons and the number of such telephone instruments it has in use at the date of each such report.

SEC. 13. That the owner or operator of said franchise shall connect the lines of its telephone system, so far as practicable, with any and all telephone lines of other companies operating in the State of Kentucky, on reasonable terms and without discrimination, the owners of such other lines to agree, as a condition of such connection, to receive and transmit on like terms all messages in which the owner or operator of the franchise herein granted may be interested. In case there shall be any disagreement between the owner or operator of the franchise herein provided for and the owner of such other telephone lines as to the terms and conditions upon which such connection shall be made, as to hinder or delay same, then such difference and disagreement shall be promptly submitted to an arbitration committee, to be composed of three freeholders and voters of the State of Kentucky, one of whom shall be named
143 by the owner of said franchise, one by the owner of such other line or lines, and the third by the Mayor of the City of Louisville, and the decision of a majority of said committee as to the terms and conditions upon which said connection ought to be made shall be final and conclusive upon all such parties.

SEC. 14. The purchaser or owner of this franchise or privilege shall within fifteen (15) days after the approval of said sale by the General Council, execute bond to the City of Louisville, with good and sufficient surety, to be approved by the Board of Public Works in the sum of Thirty Thousand Dollars, conditioned upon the faithful performance and discharge by the owner or operator of this franchise of all the obligations imposed by this ordinance, and that said owner or operator shall restore the sidewalks and pavements of all public ways to their original condition and shall save the City harmless from all loss or damage which may be done to its public ways and other property, or to the person or property of individuals on account of any wrongful act or omission of such owner or operator, and that such owner or operator shall defend all suits and pay all judgments against the City of Louisville arising out of the construction, maintenance or operation of said telephone system. Said bond shall be renewed from time to time as and when

required by the City of Louisville, through its Board of Public Works, provided, however, that when said purchaser or owner has completed and ready for operation a telephone plant with such capacity as is required by Section 4 of this ordinance, then
143½ the amount of said bond shall be renewed for the sum of Ten Thousand instead of Thirty Thousand Dollars.

SEC. 15. That the franchise or privilege herein provided for shall not be construed as being in any manner exclusive, or as preventing the General Council of the City of Louisville from providing for and causing to be sold other franchises or privileges for conducting a telephone system in the City of Louisville.

If any individual, firm, or corporation now operating a telephone system under any ordinance of the City of Louisville granting a franchise, privilege, or license therefor, shall become the purchaser or owner of the franchise or privilege herein authorized to be sold, such previously granted franchise, privilege or license shall immediately upon the acquisition of the franchise or privilege herein ordered to be sold, became null and void and be forever surrendered to the City of Louisville, and all obligations created by the ordinance granting the same or the acceptance thereof, shall immediately cease and determine, it being the intention to provide by this ordinance a complete and comprehensive telephone system in the City of Louisville.

SEC. 16. That an ordinance, entitled, "An ordinance granting to the Ohio Valley Telephone Company permission to lay underground pipes, cable conductors and wires," approved January, 26, 1884, be, and the same is hereby repealed; and also an ordinance entitled "An ordinance confirming and ratifying Section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled 'An act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company
143¾ the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors, and wires, and to operate its telephone lines over, along, or under any highway, street, or alley in the city of Louisville," approved August 17, 1886, be and the same is hereby repealed; and also an ordinance entitled "An ordinance regulating the charges for telephone service in the City of Louisville," approved November 12, 1906, be and the same is hereby repealed.

SEC. 17. Should said franchise or privilege be purchased by any individual, firm, or corporation now operating a telephone system in the City of Louisville, such purchaser may use his or its conduits, subways, manholes, wires, poles and other properties constituting such existing telephone system as now established in operating the franchise or privilege created and sold under this ordinance.

SEC. 18. This ordinance shall take effect from and after its passage.

——— ———, *C. B. C.* ——— ———, *P. B. C.*
——— ———, *C. B. A.* ——— ———, *P. B. A.*

Approved—

——— ———, *Mayor.*

144 EXHIBIT "B" WITH ANSWER.

Ordinances Which Are Sought to be Repealed.

145 An Ordinance Granting to the Ohio Valley Telephone Company Permission to Lay Underground Pipes, Cables, Conductors, and Wires, Approved Jan. 26, 1884.

1. The Ohio Valley Telephone Company, a corporation organized under the general laws of the State of Kentucky, its successors and assigns, are hereby granted permission to construct, maintain and repair, and operate in the public streets, avenues, alleys and sidewalks of the City of Louisville, Kentucky, for the term of twenty-five years successively from the approval of this ordinance, pipes, cables, wires and other conductors, together with all the necessary testing stations and other attachments and appurtenances for the purpose of transmitting sound, signals and telephone communications by means of electricity.

2. Said pipes, cables, wires, etc., shall be laid under ground, and in such manner as not to interfere with the proper use of said streets, avenues, alleys and sidewalks.

3. Said Telephone Company, its successors or assigns, shall make no excavation in any street, avenue, alley, or sidewalk without first obtaining written permission to do so from the City Engineer.

4. They shall not at any time open or incumber more of any street, avenue, alley, or sidewalk than may be necessary to enable them to perform the work with proper economy and efficiency in the laying of their wires, conduits, pipes or conductors, nor shall they permit such opening or incumberance to remain for a longer period than may be necessary to do the work for which said opening shall have been made, and they shall put up and maintain about said opening and encumberances such barriers and lights as will effectually prevent the happening of any accidents by reason of such openings or incumberances.

5. In laying pipes, cables or conductors the said Telephone Company, its successors or assigns, shall do no permanent injury to any street, avenue, alley or other public place or shade tree, nor shall they unnecessarily disturb or interfere with any sewers, water pipes, or gas pipes now laid in the city, or which may be laid at said time.

6. Wherever the said Telephone Company, its successors or assigns, shall open ground for the purpose of laying its pipes, cables, or conductors, they shall with all due diligence, after the completion of said work, restore said streets, avenues, alleys and sidewalks so

opened, or any sewer, gas pipe, or water pipe located thereon, to a condition equally as good as when said opening was made, at their own expense, and to the satisfaction of the City Engineer, and in case of their failure or refusal to do so, the City may proceed to do the same and the said Telephone Company, its successors, or assigns, shall be liable for the cost thereof.

7. Said Telephone Company, its successors or assigns, shall commence the construction of said system within six months after the approval of this ordinance.

8. The City of Louisville reserves the right to lay wires in the said pipes and conductors for the fire and police service of said
146 City, such use by the City to be free of any charge on the part of said Telephone Company, its successors or assigns; and it is further stipulated that in portions of the City wherein telephone pole lines are used the said company guarantees to the City the use of the top ten inches of said poles, free of charge, for its fire and police service.

9. In no case shall the City be liable for any injury or damage to any third party which may be caused by the putting down of said pipes, cables, conductors, or wires, by the said Telephone Company, its successors or assign, and the said Telephone Company, its successors or assigns, shall protect the City and hold it harmless from any and all damages which may arise from said cause.

9. As soon as practicable, after the approval of this ordinance, and before the said Telephone Company, its successors, or assigns, shall be allowed to open any street, avenue, alley or sidewalk for the purpose hereinbefore stated, the said Telephone Company, its successors or assigns, shall execute a bond for the sum of Fifty Thouand Dollars, with good and sufficient security, in favor of the City of Louisville, conditioned that the said Telephone Company, its successors or assigns, shall faithfully comply with all the requirements of this ordinance, said bond to be renewed from time to time, with such security as the General Council may require.

11. Nothing in this ordinance shall be construed as to give to said Telephone Company, its successors or assigns, any exclusive right to lay underground pipes, conductors, cables or wires in the streets, avenues, alleys or sidewalks of the City of Louisville.

147 And on another day of said term of said court, continued and held, to-wit, on April 17th, 1909, the following proceedings were had:

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

This day came the complainant, the Cumberland Telephone & Telegraph Company, by William L. Granbery, and Fairleigh, Straus & Fairleigh, its counsel, and filed its Replication herein.

The Replication above referred to is as follows:

148 Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Replication.

The replication of the above-named complainant to the answer of the above-named defendant.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto sayeth, that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove, as this Honorable Court shall
149 direct, and humbly as in and by his said bill he has already prayed.

W. L. GRANBERY,
FAIRLEIGH, STRAUS AND FAIRLEIGH,
Solicitors for Complainant.

And on November 24th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,
vs.
CITY OF LOUISVILLE, Defendant.

This day came the parties hereto by their respective counsel and filed their written stipulation, and one exhibit herein.

The stipulation above referred to is as follows:

CHART

TOO

LARGE

FOR

FILMING

No. 7192.

CUMBERLAND TELEPHONE & TELEGRAPH CO.
vs.
CITY OF LOUISVILLE.

In this cause, to obviate the necessity of taking proof, it is stipulated between counsel that the attached card, published by the Home Telephone Company in the Louisville papers on Tuesday, October 5th, 1909, may be treated as evidence on behalf of the complainant, and the facts therein stated shall be treated and considered as testimony proven by the officers of the Home Telephone Company of Louisville.

It is agreed that this as well as any and all proofs of special evidence is subject to exceptions for competency and relevancy.

CUMBERLAND TELEPHONE & TELEGRAPH CO.,
By WM. L. GRANBURY, *Attorney.*
CITY OF LOUISVILLE,
By CLAYTON B. BLAKEY, *Attorney.*

The exhibit above referred to, is as follows:

(Here follows poster marked page 150.)

151 And on November 26th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

This day came the complainant, by Fairleigh, Straus & Fairleigh, its counsel. Came also the defendant by Clayton B. Blakey, W. O. Harris and Huston Quin, its counsel, and filed exceptions to the deposition of J. E. Caldwell, taken on behalf of complainant. On motion of the defendant by its counsel, it is ordered that the depositions taken on behalf of the defendant be opened by the Clerk and published.

The exceptions above referred to are as follows:

UNITED STATES OF AMERICA:

The Circuit Court of the United States in and for the Sixth Circuit and Western District of Kentucky, at Louisville.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Plaintiff,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Exceptions to Depositions.

Now comes the defendant annd excepts to the following parts of the deposition of J. E. Caldwell, viz:

All of the first question on page 24 of said deposition together with the answer thereto; all three questions on page 25 of said deposition, together with the answers thereto; the question on page 26 of said deposition, together with the answer thereto; all of the questions on page 28 of said deposition, together with the answers thereto; for the reason that the same is incompetent, irrelevant, immaterial and hearsay, and for the reason that the witness is merely quoting from what some one else said or rather from a stenographic report showing what some one else said.

W. O. HARRIS,
CLAYTON B. BLAKEY,
Attorneys for Defendant.

152 And on the same day of said term of said court, towit, on November 26th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
vs.
CITY OF LOUISVILLE, KENTUCKY.

This day came the complainant, the Cumberland Telephone & Telegraph Company, by David W. Fairleigh, Esquire, its counsel,

and came also the defendant, the City of Louisville, Kentucky, by Clayton B. Blakey, Esquire, City Attorney, and W. Overton Harris, Esquire, its counsel, and thereupon this cause came on to be heard for final decree upon the whole record; and upon said hearing there was read the bill, the amended bill, the answer of the defendant and the replication of the complainant; and, also, there was read all exhibits referred to in said pleadings and filed therewith. There was also read upon said hearing the deposition of James E. Caldwell, taken on behalf of the complainant, and the following depositions taken on behalf of the defendant, P. L. Longest, G. L. Redmon, Edward H. Marcus, Daniel Mayner, Geo. Schuster, H. Bachman, Thos. Lannahan, J. A. Hodges, C. F. Wimberly, M. Victor, Frank Birchler, Henry Heuser, Wm. Ruby, A. V. Thompson, Mrs. Tim Murphy, Mrs. Sue M. Davis, T. J. Jones, J. H. Snyder, J. G. Taggart, C. Troxler, M. J. Doll, Jack Marx, Jos. M. Allen, Frank Zeigler, Alice Black, Howard Griswold, W. S. Whitesides, I. W. Bernheim, George G. Brown, R. E. Wathen, Vincent Davis, Max Schimpeler, Arthur H. Partridge, J. M. Schoenbaechler, Jno. B. Baskin, W. E. Winkler, Lewis R. Atwood, Geo. Aufenkamp, F. M. Fisher, Simon N. Jones, Joseph Gathright, G. Ernst, Geo. Stauber, James F. Grinstead and H. B. Warren. There was also read all exhibits and documents made parts of said depositions. There was also read a stipulation made by the complainant and the defendant, by their respective counsel, filed herein on November 24th, 1909, stipulating that a certain statement published by The Louisville Home Tele-
153 phone Company in the Louisville papers on Tuesday, October 5, 1909, might be read, subject to exceptions for competency and relevancy, whish said statement of The Louisville Home Telephone Company was read upon said hearing; and, after hearing arguments of counsel for the complainant and for the defendant, and the Court not being now sufficiently advised, this cause is submitted for final judgment.

The deposition of James E. Caldwell, taken on behalf of the complainant, is as follows:

154 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky.

No. 7192.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

The Deposition of James E. Caldwell, Taken in the Above Cause by the Complainant, at Nashville, Tennessee, May 28th, 1909, Pursuant to Notice Hereto Attached, and in the Presence of Counsel Representing the Complainant and the Defendant.

Said witness being duly sworn, deposes as follows:

Direct examination.

By Mr. W. L. GRANBERY, for the complainant:

Q. You are the President of the complainant Company?
A. I am.
Q. How long have you been connected with it?
A. As President, since 1890, and as a Director, since 1885, or thereabouts.
Q. Prior to your election as President, were you a member of the Executive Committee?
A. I was.
Q. I will ask you to attach, as part of your deposition, a pamphlet which purports to be the Charter of the Cumberland Telephone and Telegraph Company and the various companies with which it was consolidated, it being agreed by counsel that it is an exact copy of a certified copy and may be used in lieu of a certified copy—mark it Exhibit No. 1.

155 A. I have the paper and herewith file it, and mark it as Exhibit No. 1.
Q. You swore to the bill filed in this case, did you?
A. I did.
Q. Are the statements therein made true?
A. They are.
Q. Has the bond specified in the ordinance passed by the General Council of the City of Louisville, and approved August 17, 1886, been renewed from time to time since the Cumberland Company was consolidated with The Ohio Valley Telephone Company, as requested by the city officials?
A. It has.
Q. And that bond is now in full force and effect?
A. It is.
Q. It is stated in the answer of the defendant, in Paragraph 3, that the policy of the complainant company in operating a telephone system in Louisville has been dictatorial, arbitrary and offen-

sive to the citizens of Louisville, and without any regard for Louisville or its citizens. Is that true?

A. That is absolutely not true, but the very reverse of it is true. As an evidence of that, it will be found that in each and every printed issue of the Directory that has been issued for years in the City of Louisville by this Company, the following notice appears:

"To Our Patrons:

"This company sincerely desires to give the best service possible, and, to this end, will spare no expense, and will thankfully receive any suggestions calculated to give any more satisfactory results. We employ great numbers of people to keep up the system, and are prepared to attend to any needed repairs on the shortest notice, and if any are unduly delayed or neglected, it is the fault of some one who is drawing pay to attend to just such matters, and, if reported promptly, will be quickly remedied.

156 "Uniform courtesy and politeness is an imperative rule of this company, and any infraction thereof will receive prompt attention if reported by letter or telephone to the general office."

(Signed) "JAMES E. CALDWELL,
President."

This is a standing notice, and appears, and has appeared, as I say, in the printed directories that go into the hands of the public from three to four times a year, for the last many years. And that really and truly represents the spirit and policy of the Company.

Q. Has the Company intentionally, or purposely, or knowingly discriminated between the patrons in Louisville?

A. It has not.

Q. Has there been any distinction made between one class of patrons over any other class, in the City of Louisville?

A. No sir, there has not.

Q. Mr. Caldwell, when did you first learn of the fact that there had been such a corporation organized under the laws of Kentucky as Ohio Valley Telephone Company?

A. The first I ever heard of it was at a meeting held before a Committee of the City Council of Louisville, when the statement was made by Judge Richards, who represented that he was there as ex-City Attorney, he being familiar with the facts, to speak for the then city administration, and this was in the latter part of 1908. That was the first time that I ever knew or heard of such a company.

Q. Please state whether or not the complainant company has increased its capital account in the City of Louisville since 1900, that being the time when it consolidated with the Ohio Valley Telephone Company.

A. Yes sir, it has increased it considerably since then.

Q. Is it necessary, in conducting a telephone business, to increase the capital account from year to year?

A. If it meets the growth of the community, it is.

Q. Has the complainant company undertaken to meet the growth of the business in the City of Louisville?

A. It has, diligently, steadily, and to the very best of its
157 ability.

Q. And in that way has it increased its equipment from year to year?

A. In that way it has been necessary, and has increased its equipment from year to year, and month by month, continuously.

Q. Has there ever been any suggestion or intimation that the complainant had no right or authority, or that there was any question about its right to conduct the telephone business in the City of Louisville under the authority given it by the Kentucky Legislature and the General Council of the City of Louisville?

A. There never was the slightest intimation until the matter was brought up by the City Council, until the time this repeal brought on this litigation.

Q. State whether or not you, in person, saw the Mayor of the city prior to the introduction of this repealing ordinance, and made any statement to him with reference to the Company's right to do business in the City of Louisville.

A. I did.

Q. Did you, in that interview, insist that the Company had a right which the City could not deprive it of?

A. I did emphatically, explain to him in detail our idea and attitude and advice on that subject.

Q. Now I will ask you to state whether or not the same policy and same general business principles are now, and have been from the beginning, pursued in Louisville that have been pursued by the Company and its officials in its entire territory, where there is competition and where there is no competition.

A. Yes sir.

Cross-examination by Mr. HUSTON QUIN, for the defendant:

Q. Mr. Caldwell, you say there has been no distinction nor difference between the patrons of the Cumberland Telephone Company in Louisville, Kentucky?

A. Not of the same class under the same circumstances.
158 Q. Have you got a copy of the monthly statement submitted by the Louisville office for the month preceding the month in which the bill in the present case was filed?

A. I have the statement here, and hand it to counsel.

Q. How many classes of service are there prevailing in Louisville, Kentucky?

A. We have put out, from time to time, I suppose, thirty or forty different classes of service there, endeavoring to try, if possible, to please and to meet every conceivable sort of demand that could be made for service, in an effort to popularize the business; for when this company took hold of the business in Kentucky, and in Louisville, it not only had considerably higher rates than now, or have been charging since then, but there was a distinct lack of develop-

ment of the business. For instance, in a city there of something like 250,000 people, they had about 2,500 subscribers only.

Q. At what date are you referring to now?

A. I am referring now to 1900, about the time the Cumberland Telephone Company consolidated with the Ohio Valley and became responsible for the conduct of the business there. In our effort to popularize and develop, and meet every conceivable demand that the public might have for telephone service, we have put out, at one time and another, in all likelihood, forty different rates.

Q. How many different rates or classifications, as you may term them, were effective in Louisville during the month of January, 1909?

A. In all likelihood, there were at that time perhaps thirty different classes of rates in use there, but not so many were being offered to new subscribers; that is to say, some of the rates that have been found to be useless, or impracticable, had been discontinued, but those patrons who had taken service and made contracts for that class, and at those rates, had not been deprived of it, but were being left with their rights, but such rates and contracts were not being continued to new customers.

Q. Mr. Caldwell, can you include in your deposition a
159 specification of these various classes or different rates, and give the amount per month of each of them?

A. Yes I can, and will do so. I suppose I can, at least. I think the old tariffs can be found somewhere, and, if so, I will be glad to file them.

Q. I am referring particularly to January, 1909.

A. Yes (paper marked Exhibit No. 2.)

Q. Then, if I understand you correctly, Mr. Caldwell, there were approximately thirty different classifications, or rates, prevailing in Louisville during the month of January, 1909.

A. No sir, I mean to say by that there might possibly have been thirty different classes of rates that were then being used by patrons who had, many of them, before that time, made contracts with the company, but who had not been deprived of those respective classes, but at that time the different classes of rates that were then current, in force and being contracted for, did not represent anything like that number, and, in all likelihood, were not more than eight or ten. The schedule of rates referred to in your question and offered to patrons on January 1st, 1909, are set out fully in the bill.

Q. In addition to which, I understand, there were certain old contracts or rates that some people were availing themselves of, is that correct?

A. Yes, in addition to those.

Q. When did you begin to raise your rates, generally?

A. Answering that question, we have never begun to raise our rates in Louisville. On the contrary, when the Cumberland Company first acquired the Ohio Valley Company, rates were current of two kinds, about nine dollars per month for business telephones, and about six dollars per month for residences. Those two classes were at once lowered, both of them, and we added a great variety of other

schedules of rates, all considerably lower. That downward tendency continued in some instances, and in residences particularly, under stress of competition, they were passed down to a point where they were so entirely unremunerative that we recognized that they could not longer be continued, and an adjustment of those resi-
160 dence rates, and some of the business rates that had grown out of that circumstance, was undertaken about the Spring of 1907. The maximum residence and business rates were never as high, and are not now as high, as they were at the time this company consolidated with the Ohio Valley Company, but, on the contrary, they are considerably lower, and when this company did consolidate with the Ohio Valley Company, the business in Louisville was then conducted by and in the control of citizens of Louisville.

Q. Since the Spring of 1907, there has been a gradual increase, has there, in the rates?

A. No sir, since the Spring of 1907 the rates were more than those that are current now. I don't know that there has been any change in them from that time to this, but, of course, there has been an adjustment with old patrons as their contracts for service and those old classifications heretofore referred to, as they expired, the effort was made to adjust them to the new classifications.

Q. Then, the rates prevailing now are higher than the rates were in 1906.

A. Some of them are. Some of the classifications are higher than some of the classifications then, but the maximum business rate now is no higher than it was then.

Q. At what period between 1900 and the present date did the rates of the Cumberland Company reach the minimum figure?

A. I should say in 1904 and 1905.

Q. Can you furnish us the classes of service furnished at that time, and the charge per month, for each of said classes?

A. I think so, and will be very glad to do so if those schedules are in existence. (Marked Exhibit No. 3.)

Q. Since that date there has been a gradual increase in the various classifications and rates?

A. No, there was an adjustment made, as heretofore stated, about the Spring of 1907. The classifications were shifted at that time, and I do not recall any other shifting since that time.

Q. Well, the adjustment you refer to was an increase in the rates, wasn't it?

161 A. It was an increase in certain classes; that increase, however, did not carry it back by any means, to the figures that were in existence in 1900.

Q. But, as a matter of fact, when this adjustment took place, the meaning of the adjustment, as you refer to it, was an increase in the rates—certain classes?

A. It was really to do away with what was termed cut-throat rates, rates that had been brought into existence by cut-throat competition.

Q. What competition do you refer to?

A. I refer to the competition of the Home Telephone Company, of Louisville.

Q. What classes of service were increased in that adjustment?

A. They were in residence party lines and direct residence rates.

Q. And the business 'phones were not changed?

A. I don't think there was any material change made in the business telephones at all.

Q. Hasn't there been an effort in the last few months to increase the rates of business telephones in Louisville?

A. There has, in a certain class, because they are certainly needed, because the business is not profitably or sufficiently remunerative to make it profitable, and it is just and right that a better rate should be obtained, and it is absolutely necessary to do so, and will finally have to be done, if the business is to be perpetuated.

Q. What classes do you refer to now?

A. I refer practically to all of them, unless it be practically the maximum business rate; that one rate may be sufficient, but that is doubtful.

Q. How long has the present straight business rate been in operation in Louisville?

A. The straight maximum business rate has been in operation in Louisville since immediately after the Cumberland Company consolidated with the Ohio Valley Company. That rate was made then, or a month or two afterwards, and has been in force ever since.

162 Q. Then, as I understand you, since that consolidation, or about a month or two thereafter, the rate for business telephones, a private metallic service, is eight dollars per month, gross, subject to fifty cents a month discount?

A. That, sir, is correct; there has been no change in it since that time.

Q. Don't you know, Mr. Caldwell, since that time there have been telephone instruments installed at a less rate than that?

A. Not of that class, not to my knowledge and belief, and if it has been done, it is contrary to the orders and would have been in violation of orders from this office, and I do not know that anything of that kind has ever been done.

Q. You have no contracts made or renewed since approximately a month after the consolidation in 1900, of a less rate than eight dollars per month, gross?

A. There was a three-year contract in force, or a rule of that kind in force at that time; there was a rule that if parties would make a three-year contract, they would get a net rate of $6.50, and we continued that; or, in other words, we did not discontinue that for some time,—and some new contracts, perhaps, were made of that nature. Just when that was discontinued, I do not remember, but that was a rule that was in force when we took hold of the property, and we continued it for some time, and may have made such contracts, and likely did, but we soon recognized that it was not an advisable thing, and certainly not profitable, and we discontinued it.

Q. About when did you discontinue that?

A. I don't know just about when that was, but can find out and will be very glad to give you the information from the records.

Q. And will you do so and supply it in your deposition?

A. I will, yes. November 1, 1904.

Q. Does the same thing apply as to the two-station metallic service of business telephones as applies to the single line?

A. I don't know what you mean by that.

Q. Has there been any change in the rate of the two-station
163 metallic business telephone since 1900?

A. I don't know whether there has or not; I am not familiar enough to say that off-hand, but will look up the record and see. Yes—from $6.50 to $5.00, April 1, 1902.

Q. Mr. Caldwell, attached to the report for January, 1909, which you have kindly furnished me, I find the second, third, fourth and fifth sheets are termed classification of rates, and purport to show the number of instruments, the gross rate per month, and the earnings for the month, of telephone service in Louisville, Kentucky. I will ask you to please explain the meaning of that classification, especially as to the number of instruments and the gross rates and the earnings per month, and how there happen to be so many different telephones of different rates.

A. The first list is public stations; the next is circulation promotion companies; the next is party lines; the next is deadheads; the next is dead-head switchboards; the next is telegraph instruments; the next is the number at seventeen cents; the next at forty-two cents; the next at fifty cents; the next at sixty-five, and so on, as indicated by the sheet itself. They are all for different characters and classes of service, according to their location, circumstances, whether for extension sets, hotel private branch exchanges, commercial private branch exchanges, speaking tube sets, interior house sets, various party line rates for business and residences; others that are affected by the distance from the office, for, outside of a given area, there is an additional charge made for mileage. All of these various circumstances control; then the trunk lines, private branch exchanges. In other words, they represent all of the phases of the public requirements for telephone service. There was no intention or desire to discriminate among any parties with reference to those various classes, but, on the contrary, they were open to the public alike.

Q. Mr. Caldwell, if I figure correctly, there are 168 classes of instruments, all with a different rate per month, which prevailed in the City of Louisville during the month of January, 1909,—
164 is that correct?

A. No sir, that is not correct; there are that many on that sheet, but many of them are outside of the city, out in the country, and on the Indiana side of the river, and in adjoining counties, for the Louisville Exchange embraces a very considerable area of country, taking in a part of two states and parts of several counties.

Q. I will ask you if you will file as a part of your deposition so much of this monthly report of January, 1909, as covers the classification of rates.

A. I will be glad to do so, and furnish them for any number of months you would like to have (Marked Exhibit No. 4.)

Q. Will you please explain how it is these various rates are charged, so that we may understand the difference in the rates as shown on this classification?

A. The principle upon which the rates are made is an endeavor to give parties service, or charge parties, a rate proportionate and commensurate with the class of service, and the purpose for which the service is desired. The wire, the class of instrument, and all those things necessarily enter into it, and were considered in making these various classes of rates; the distance from the office, the type of instruments, the class of service desired, as, for instance, whether it was for residence or business, whether it was a public or a private station, whether a party line, and, if so, how many various people were to be on the line; whether it was one extension set or various extension sets, and where those extension sets were to be located in the various premises, in hotels and office buildings; extension sets, private branch exchange sets, private detective service, private watchman service, public stations, semi-public stations, private branch exchange, trunk line and extension sets, the length of the various extension sets, whether it was across the Ohio River or not, whether it went into adjoining counties, whether it was on the highways or had to be built privately off the highways, whether the wire necessary to be used would be iron or copper, of the various grades and sizes of wire, whether in cable, and, if in cable, what gauge of
165 wire it would be necessary to use, whether No. 14, 16 or 18 gauge wire. And so, as I say, the various variety of conditions that had to be met and do, have to be met, in developing so novel and new a business as the telephone business. All those things entered into and explain the variety of rates referred to in the sheets which have been filed.

Q. Then, you are mistaken in saying there are only thirty rates or classifications prevailing in Louisville, Ky., in the month of January, 1909?

A. I was endeavoring to answer what I thought you had in mind, that is, what schedule of rates was then left current inside of Louisville city proper, of what we term the standard, not referring to special contracts or private contracts for a service of a peculiarly private nature. That was what I thought your question alluded to and was endeavoring to answer. The schedule of rates I have given you is a complete schedule of the classes and kinds of telephone facilities which we were furnishing the public in January, 1909.

Q. Will you undertake to furnish for us a description, showing the character of the various classifications represented in this January report, 1909?

A. Yes, I will. (Marked Exhibit No. 5).

Q. Mr. Caldwell, with reference to the Seelbach Hotel in Louisville, I will ask you how many telephones are included in this January list, as belonging to that hotel.

A. I will look up the record and be glad to give you the informa-

tion. I have not the slightest idea, at present, but I suppose it included what they had.

Q. I hand you what purports to be a list of the various subscribers to the Louisville Exchange, among others the Seelbach, and included in which is a list of eleven numbers. I will ask you if you consider that eleven telephones or not.

A. These were trunk lines, leading from our switchboard to the private branch switchboard, as I take it, of the hotel, and to booths in the hotel, and were furnished as a part of the equipment of the hotel. There appear to be something like three hundred stations that were furnished for the private branch exchange.

166 Q. Are those trunk lines free or not?

A. They are furnished free with the hotel contract and go with the private branch exchange, and are included as a part of the exchange.

Q. In giving, therefore, the list of telephone subscribers in any given month, therefore, you included the Seelbach as eleven telephones, or is it three hundred?

A. In all likelihood, as three hundred.

Q. By referring to the same list of names of your subscribers in Louisville, I find, among others, line Main 22, Dodd & Dodd, no discount, business, direct, $6.00—I will ask you if that is a correct statement?

A. I am sure I don't know; I have no reason to question it; it was made up in the regular order and I know nothing about the particular case you refer to.

Q. Do you find the name on that list?

A. Yes.

Q. That really is less than the standard rate, then, as you call it?

A. I don't know anything about this particular case and have nothing to bear on the subject at all, other than appears in this general list.

Q. When was it that you had this conference you referred to, with the Mayor of the city?

A. I think it was in December, 1908.

Q. Was that the time you appeared before the Council in Louisville, or about the same time?

A. The same day.

Q. Was that before or after this ordinance had passed?

A. That was before,—I had the conference on December 19th with the Mayor.

Q. Was the matter of the repeal of the Company's franchise discussed between you and the Mayor at that time?

A. Yes, it was.

167 Q. You knew at that time that the matter was being agitated about repealing the franchise, did you?

A. Yes; the circumstances were these: The Mayor stated that he was worried to death there by the people complaining over the telephone situation, growing out of competition; they were very much worried over having to pay two rates; that he had no complaint to make of the Cumberland Company, or, rather, that there wasn't any,

or that he didn't make any, at any rate, of the Cumberland Company, except it was one of two concerns, and they were extremely anxious to get it into one, and he didn't seem to care very much how they did that, and he thought the way in which they could get it was to repeal the Cumberland Company's franchise, and they had a belief that the Home Company was on a schedule of rates so it would go into bankruptcy and fail, and that they would then sell the new franchise, and out of the wreck and ruin that was going to be created would come a new company which would be the only company to do business there, and that it would have the solid support of the entire community and would exist or run under those conditions, and that they could get better rates and more satisfactory conditions out of that. In other words, it was plain that the proposition was to wreck the two concerns, they wreck one and the other would wreck itself, and out of that wreck and ruin would come a new institution.

Q. That was what you gathered from the conference, was it?

A. That was what was stated.

Q. That it would wreck one or the other?

A. Yes, and was repeated more in detail in the Council Committee by Judge Richards, who stated that he appeared there for the administration.

Q. Did you not, then and there, decline to bid on a new franchise, if one was offered?

A. Yes, I stated we would not, and the object of my coming there was to let them know how impossible it would be to expect us to bid on one, and that we regarded what we had as being better than anything they could make, and certainly as legal and binding on
168 the City as that administration could make it, and if the one we had was not a legal one, they could not make one and there would be no purpose or point in giving up what we had and take another. I made that plain and emphatic.

Q. Did the Mayor, at that time, or shortly thereafter, request of you that you permit the books of the Cumberland Company to be examined?

A. I never saw the Mayor from that day to this, and he has never made any such request of me, directly or indirectly.

Q. Has any request ever been made on behalf of the City of Louisville for an examination of the books of the company?

A. Yes, and they are at it right now.

Q. Prior to the time the second suit was filed by the Cumberland Company against the City, was there any request for an examination of the books of the company ever made?

A. No sir, there was not, except as I stated, there are now quite a corps of accountants investigating our books.

Q. But that is under the second suit that has been filed?

A. Yes. I don't know that it is in this suit, but it is in another pending with the same litigants. In other words, whenever the City of Louisville has requested us to examine our books, they have been permitted to do so, and there never has been a time when they were denied access to them. In addition to that, a committee of citizens in the Board of Trade requested it, were given access to them, and

did exercise that privilege, and made a report entirely favorable to our contention on rates.

(Defendant objects to last sentence of the above answer, because not responsive to the question and because incompetent and irrelevant).

Q. Mr. Caldwell, since you have referred to the Board of Trade matter, I will ask you if there was not a second report made to that Board.

A. There was no report made by them as to rates. One member of the Board made a statement which very seriously reflected
169 on us and apparently on their own Board of Directors.

Q. Give his name.

A. Mr. Bullitt, I think was his name.

Q. Do you know his first name?

A. I do not; I merely saw it in the newspapers.

Q. Don't you know, as a matter of fact, there was a second report made by the Board of Trade Committee with reference to the affairs of the Cumberland Company?

A. There was another report made by them when they reported that we were carrying out the agreement made.

Q. And that is the only report ever made.

A. Those are the two reports I remember, and the only two, that were brought to my attention, except this meeting that was had by Mr. Bullitt, and who made the charge that was a very grave reflection upon both us and the Board of Directors of the Board of Trade. His reflections were equally as grave against the Board of Directors of the Board of Trade as they were against this company.

Redirect examination by Mr. GRANBERY, for Plaintiffs:

Q. You have been asked with reference to what transpired between you and the Mayor on December 19th, 1908. Was Judge Richards present then?

A. Judge Richards was not present when the interview was had with the Mayor, but was at a meeting of the City Council Committee a very few hours thereafter. Judge Richards was then present and stated that he appeared as the representative of the City administration.

Q. Was what he said taken down in shorthand and transcribed?

A. It was.

Q. I will ask you what Judge Richards said, in representing the Mayor, about the dual telephone system and its hardships on the people of Louisville.

(Objected to by defendant).

A. He said, "There was a time when the General Council of the City of Louisville and a large number of our people thought
170 it was to the interest of the taxpayers and of the public generally to have two telephone systems in the City of Louisville. The General Council of the City of Louisville was persuaded that by selling a franchise at a very low rate for monthly charges the new

company would absorb all of the business of the old, and in that way we would have virtually a new system at a lower rate. But they have been disappointed. The new company was created; it has a very large number of subscribers—somewhere between eight and ten thousand subscribers—but still the old company has grown also. It has increased its list of subscribers. It has, possibly, somewhere between ten and eleven thousand subscribers in the City of Louisville. Now, the result is, that every man who does a large business—whether it is a corporation business, a mercantile business, or a professional business—is compelled to have on his desk both telephones, and instead of paying for one telephone system, he is today paying for two, and it has become such a burden upon our people that the Mayor can scarcely walk your streets without being importuned to do something to relieve the situation. If it is in the power of the General Council of the City of Louisville to do it, the people have a right to demand at your hands that you shall relieve them of this burden. Of the seventeen or eighteen thousand subscribers to the telephones in the City of Louisville I should think it would be reasonable to assume that at least five thousand of them subscribe to this dual system. We might say, if they pay an average of $4.00 for each unnecessary telephone, it makes $20,000.00 a month, or $240,000.00 a year, that the people of Louisville are paying for an unnecessary service. It is to relieve our people of the burden which, if it can be done, should be done.

"Now, I know it may work a hardship upon one or the other of these companies. I know that it is a hardship, but can the City of Louisville afford to say that our people shall be taxed from $100,000 to $300,000 a year when there is a legal way to relieve them of the burden, if there be a legal way?"

Q. Now, Mr. Caldwell, what company did he refer to there as charging a four-dollar maximum business rate?

A. He was referring to the Louisville Home Telephone Company.

171 Q. At that same meeting was that company represented?

A. It was, by Mr. Helm Bruce.

Q. What position did he occupy?

A. He was Vice-President, I understand, and a Director, at any rate, and general counsel for that company.

Q. What did he have to say on that occasion, with respect to his company and its rates?

(Objected to by defendant.)

A. Mr. Helm Bruce said: "The Home Telephone Company is interested in having a franchise, a right to operate in the City of Louisville upon terms upon which it can live and make reasonable profits for its owners. * * * It came here some years ago—seven now, I believe—and acquired a franchise to operate a telephone system. At that time, having had no great experience in the matter, it believed the rates, conditions and terms fixed in that franchise were reasonable, and that it could live and prosper under the same. It, therefore, bought the franchise and gave $10,000 for it. Expe-

rience has simply demonstrated its mistake. That is the whole story, told right there. Judge Richards said very truly a moment ago that the representatives of the Home Telephone Company had said to the Council, and I was one of them, that under the rates of the present Home Telephone franchise, by which I mean that which was sold in 1901, the Home Telephone Company could not live. I said, and I say again, that under these rates the Home Telephone Company cannot live and keep up its plant. It may live and pay interest on its bonds by letting its plant go to rack, but it cannot keep up its plant and make the extensions that are yearly required under the present rates. To continue in the City of Louisville it must have a right to charge higher rates than fixed in the old franchise. In that old franchise the idea seemed to exist that the telephone company could do business under any restrictions, that it was kind of an inexhaustible gold mine. That is not true. * * * Of course, the question of rates, so far as the Home Telephone Company was concerned, was the most material. I do not think the rates put in the original ordinance, namely, $6.00 for the first half and
172 $7.00 for the last, was fair. I have heretofore insisted, and I say now, that nothing less than $7.00 per month as an average rate for the twenty years to come would be fair. I have sat in the Board of Directors of the Home Telephone Company, operating under the present rate, and I know from experience that they are not living rates. I have also seen this matter come up on the passage of a new ordinance for the sale of a new franchise and gone into the question of rates as far as I, with my knowledge, am capable of doing, and I have enough to satisfy myself that a telephone company cannot, in the City of Louisville, and with the character of plant required, maintain its plant and make a fair living profit for its investment at less than $7.00 per month. I do not believe it can be done; I have taken the figures, the actual cash, aside from watered stocks and bonds, the actual investment and the cost of operating, and come to a conclusion as best I can, and, dividing the rates between the different classes of service, such as party lines and single lines and residence lines and business lines, and that is the conclusion I have reached after most deliberate investigation.

Now, the amendment as it is fixed here, amounts practically to an average of $7.00 per month; it is $6.00 per month for the first third, $7.00 for the second third, and as to the last third, it will be left to arbitration, not to exceed $8.00 per month. Then, if the last one third should be $8.00, it will be $6.00, $7.00 and $8.00, which makes practically an average $7.00 rate, and I will say that that is fair, but I am absolutely sure that nothing less than that would be fair."

Q. What kind of a man is Mr. Helm Bruce, as to intelligence and standing?

A. I understand he is one of the most prominent and reliable and intelligent men in Louisville; one of the most prominent citizens.

Q. Is he a man of high character?

A. Yes, a man of the highest character.

Q. And a man that stands at the top of his profession, the
173 legal profession?

A. My understanding is, that he stands at the top of the legal profession there.

Q. You were present and heard what Judge Richards and Mr. Bruce said?

A. Yes, I heard every word of it.

Q. Now, that discussion was had at the time that the City Council had under consideration the passage of an ordinance creating a new franchise, and at the same time repealing the franchise of the complainant company, did it?

A. That is correct, that was what they had before them, under consideration at that time.

Q. Now, after that ordinance was defeated, or withdrawn, at the instance of the Mayor, then the ordinance copied in the bill, which was simply the repealing ordinance, was introduced and passed?

A. Yes, that is true; after the discussion that was had on the former ordinance, that ordinance was withdrawn or defeated by the Council, or, at any rate, it was never passed; and subsequent thereto, the present ordinance referred to in this connection was passed.

Recross-examination by Mr. QUIN, for Defendant.

Q. In giving what purports to be the speeches of Judge Richards and Mr. Helm Bruce, from what were you reading or quoting?

A. I was reading from the stenographic reporters of that meeting, in a printed pamphlet.

Q. One handed you by Mr. Granbery?

A. Yes. And I heard myself every word spoken at that time that is given in this deposition.

Q. But you could not rely upon your memory, but referred to the written extract?

A. It was taken down by a stenographer that was present, and this was taken from that stenographic report.

Further, this deponent saith not.

JAMES E. CALDWELL.

174 By Mr. GRANBERY: for Plaintiff.

The Complainant here closes its proof in this case.

The telephone of Dodd & Dodd, referred to on page 19, I find to be an old style telephone, known as the "Blake" instrument, connected with a single wire—grounded circuit—being a character of service in vogue some years ago, but now considered obsolete.

JAMES E. CALDWELL.

Sworn to when given, and subscribed to before me on this June 7th, 1909.

[L. S.]

BUFORD DUKE,
Notary Public.

The depositions of James F. Grinstead and others, taken on behalf of the defendant, are as follows:

175 P. S. LONGEST, being duly sworn and examined by Mr. QUIN, as Attorney for the City, deposed as follows:

Q. Please tell us your name and occupation.
A. My name is P. S. Longest; I am President of Longest Brothers Company Automobile.
Q. Have you a Cumberland phone?
A. Yes, sir.
Q. Please give us the number of it and the kind of phone it is.
A. We have a party line, two on the line, and our number is South 861-A.
Q. How much do you pay a month for that phone?
A. We pay $4.00 per month. That is, after taking the discount off.
Q. What is your business phone?
A. Yes, sir.
Q. In your place of business?
A. Yes, sir.
Q. Have you any extension?
A. One extension.
Q. How much do you pay for that?
A. I will look at my bill—(witness examined his bill.)—$3.75 for three months.
Q. Have you any contract with the Cumberland Telephone and Telegraph Company?
A. I really do not know.
Q. How long have you had that phone?
A. We have had it for something over two years.

Cross-examined by Mr. DAVID W. FAIRLEIGH:

Q. Have you the telephone bill that was rendered you by the Cumberland Telephone Company for service?
A. Yes, sir.
Q. Will you let us see it?
176 A. Yes, sir.
Q. Please file this bill and say whether you are right or wrong in your original answer.
A. It seems that I was mistaken, that I did not get the rate of discount off the right place.

(The paper referred to was filed as Exhibit "P. S. L. No. 1.")

G. L. REDMON, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. Please state your name and occupation.
A. G. Lee Redmon; occupation, Cashier of the White Mills Distillery.
Q. Is your Company a subscriber to the service of the Cumberland Telephone & Telegraph Company?
A. Yes, sir.
Q. Give us the number of your phone.

A. Prior to January 1st we had a direct line, and our number was West 598. After January 1st we discontinued the direct line and put in a party line and that line is West 598-A.

Q. How much did you pay for that phone before January 1st?

A. $24.50 with the regular discount off. We paid $24.50 for the phone and $3.75 for the extension and got a discount of $3.00 for paying three months in advance.

Q. $3.75 for an extension was for three months?

A. Yes, sir.

Q. And the discount was $3.00 for the whole bill?

A. Yes, sir.

Q. That was for a straight line business telephone?

A. Yes, sir.

Q. What do you pay since January 1st?

A. Since January, $15.50 per quarter, and $3.75 for the extension, and we get a discount of $3.00 off for prompt payment.

Q. Off the entire bill?

177 A. Yes, sir.

Q. How many other parties on that line besides yourself?

A. One. It is put in as a two-party line.

Q. Have you any contract with the Company?

A. I think not. I don't think we have signed any contract with them at all.

Cross-examined by Mr. FAIRLEIGH:

Q. Did you have an extra name on your list put in the Telephone book?

A. No sir; no extra name.

Q. Are you sure of that?

A. Wait a minute. That is not included in this bill.

Q. I know, but it is in the charge.

A. Not in this bill. That is right, they agreed to put the Lynndale Distillery name in for $1.00, or whatever the cost of inserting the extra name for the printing.

Q. Fifty cents a quarter?

A. I do not remember.

Q. That is the cause of the charge of fifty cents you paid?

A. I don't know that.

Q. Don't you know that is true?

A. I know we have an extra name and agreed to pay whatever was right, sure.

EDWARD H. MARCUS, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. Are you a subscriber to the Cumberland Telephone Company?

A. I am.

Q. What kind of a telephone?

A. A private line.

Q. A business line?

A. Yes, sir.

Q. How much do you pay?

178 A. $8.00 a month, less fifty cents rebate.

Q. What is your occupation?

A. Merchant; I am in the paint business at 231-235 East Market Street.

Q. What is the number of your phone?

A. Main 2000.

Q. Have you any contract with the Cumberland Telephone Company?

A. I have a contract when they changed the price.

Q. Explain what that contract is—what you mean by that?

A. Prior to February 1st, 1907, I paid $6.00 for the phone, and after that date I paid $8.00, less fifty cents rebate.

Re-examined by Mr. FAIRLEIGH:

Q. Have you a bill for your telephone service?

A. I did not bring any with me.

Q. What did I understand you to say you now pay for your telephone service?

A. $8.00 a month, less fifty cents rebate for prompt payment. I have the contract if you want that.

DANIEL WAGNER, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your residence and occupation?

A. I am President and Manager of Wm. Schuff & Company, Tannery.

Q. Is your Company, Wm. Schuff & Co. a subscriber for the service of the Cumberland Telephone Company?

A. They are.

Q. What is the number of the telephone?

A. 1359.

Q. Main, South, East or West?

A. Main.

Q. How much do you pay for your service, and what kind of service have you; a party line or a straight line?

179 A. When our contract ran out two years back, they wanted to put in a party line, and, of course, we would not submit to it, we would not have a party line. We would rather give it up, it was too much bother, and we came to an agreement that they put it in for the price of $15.00 for three months, and a rebate of $1.50, and to use the party line name on it, a. If it is a party line I don't know it. We never had any call on it and never had any bother with it. I told them we would accept that, but if there was any bother we would not have it, we would throw it out.

Q. What did you pay before you made this change—how much a month?

A. For three months, $10.00 and something. It was $12.00 and a rebate of $1.50. I had the bills here for four, five, six or seven years.

Q. Since that time you paid $15.00 a quarter, with the discount of $1.50?

A. Yes, sir.

Q. And there is no one else on that line that you know of?

A. Not that I know of. We call it A. When I am outside, I call up 1359.

Q. You don't have to give the letter?

A. I never did. If there was a party line, I didn't know it. We never felt anything of it.

Q. The Company asks you to call that a party line?

A. Yes, sir; a party line, and if it was necessary I said they could put it on, but I said If there was botheration we would throw it out, and we didn't sign any contract.

Cross-examined by Mr. FAIRLEIGH:

Q. It is a party line?

A. It is named a party line.

Q. They told you they would make it a party line?

A. They said they would make it a party line, but it ain't.

Q. That is what they said they would do?

A. They said it would be a party line for that price.

Q. You said if there was any trouble you would order it out?

180 A. Yes, sir.

Q. But there was an understanding between you and the Company that it should be a party line?

A. Yes, that was the understanding.

GEORGE SCHUSTER, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. Give your residence and occupation.

A. We are in the wholesale grocery business at the corner of Floyd Jefferson.

Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. Not now.

Q. Were you a subscriber to the service of the Cumberland Telephone Company?

A. Yes, sir.

Q. What kind of a line did you have?

A. We first had a $6.00 line.

Q. Was that a straight business line, or a party line?

A. That was a straight business line, and they wanted to raise the rent and they came around and gave us a party line, but they agreed not to put any party on it.

Q. When was that?

A. That was about a year ago, or a little over.

Q. What was the number of the 'phone when you had a straight business phone?

A. 2039.

Q. Main?

A. Yes, sir.
Q. What was the number after it was changed to a party line?
A. I couldn't say that, I do not recollect. We didn't have it long.
Q. You paid $6.00 a month for the straight line?
A. Yes, sir.
181 Q. How much did you pay for the party line service?
A. $3.50; $4.00, with a half dollar off.
Q. $4.00 a month with a half a dollar off?
A. Yes, sir.
Q. How long did you have that phone?
A. Not long, four or five or six months.
Q. Why was it taken out?
A. They agreed not to put anybody on, and we told them at the time if it bothered us, or anybody else was put on, we would take it out, and we have taken it out.
Q. They did put somebody else on the line?
A. Yes, sir.
Q. And you ordered it out?
A. Yes, sir; and afterwards we had another line.
Q. What kind was that?
A. They gave us a pay station.
Q. Is that in there now?
A. No, sir.
Q. What did you pay for that?
A. $4.00, with a half a dollar off, a straight line with nobody else on the line except ourselves when they gave us a pay station.
Q. How did you pay the $4.00, did you guarantee $4.00?
A. No, sir; we paid $4.00 with a half dollar off.
Q. Did you have to pay every time you used the phone?
A. No, sir.
Q. Explain what kind of a contract or agreement that was.
A. We didn't have any contract at all, just a verbal agreement with the agent who came around.
Q. Explain just exactly how you had that installed, under what agreement.
A. We were to pay $12.00 for three months, with fifty cents rebate each month.
Q. You had unlimited service?
A. Unlimited service.
Q. Why did you take that out?
182 A. They wanted to raise the rent.
Q. When was that put in?
A. Right after the party line was put in.
Q. Do you know when that was?
A. We only had the pay station about six or nine months, I reckon.
Q. Can you give us the date approximately?
A. I could not give it.

Cross-examined by Mr. FAIRLEIGH:

Q. Originally you paid a $6.00 rate?
A. Yes, sir.
Q. Did you have a contract?
A. We had a contract for that.
Q. A written contract?
A. I think so.
Q. It expired?
A. Yes, sir; I think it expired, it just really was not renewed. It was for a certain length of time, and it ran on without any more contract.
Q. It was subject to discontinuance by notice?
A. Yes, sir.
Q. And the notice was given?
A. Yes, sir.
Q. And then the party line was put in?
A. It was a party line put in, but they agreed not to put anybody on it.
Q. Your agreement was a talk with the solicitor?
A. The man who came around, yes.
Q. There was another man put on the line afterwards?
A. Yes, sir.
Q. And you took it out on that ground?
A. Yes, sir.
Q. This was a pay station that you refer to, outsiders were required to pay?
183 A. Outsiders were required to pay.
Q. Before they got the service?
A. Yes, sir.
Q. It was just a regular pay station that they put in everywhere?
A. I suppose it was like all of them.

Re-examined by Mr. QUIN:

Q. Did you get any part of the proceeds of what was received from the outsiders?
A. We got some little, but it was not so very much.
Q. Do you know what percentage you got?
A. I could not say that.

H. BACHMAN, JR., called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?
A. H. Bachman.
Q. Are you the baker?
A. Yes, sir.
Q. Give us your residence and place of business.
A. Business and residence is the same place, 819 East Market, and a bakery.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. Yes, sir.
Q. Please give us the number.
A. Main 3563.
Q. What kind of a phone is it?
A. It was put in at the time they were giving the Cumberland Telephone service for the subscribers to the Courier-Journal. It was put it and they gave twenty tickets and every time you had a message you had to put in five cents, and afterwards they gave you three-cent tickets. It is not in the business place, it is in the residence.

184 Q. Have you a business phone?
A. No, sir.
Q. You use this phone for business?
A. No sir; we have the Home Phone; we don't use this for business.
Q. When was this installed?
A. I cannot say, but about three years ago.
Q. You have still got that phone?
A. Still the same, guaranteeing them one dollar a month. Whenever we use it for private purposes we generally drop in a nickel, and at the end of the month we make up the difference.
Q. How many calls can you make on that phone?
A. We have to pay a nickel for each call, and we guarantee them a dollar.
Q. That is a straight line?
A. Yes, sir.
Q. Have you a written contract with the Company?
A. No sir, the contract ran out.

THOMAS LANNAHAN, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. Give your residence.
A. Number 1811 Edenside.
Q. Are you a subscriber for the service of the Cumberland Telephone Company?
A. Yes, sir; I have a pay station.
Q. At your place of business or residence?
A. Residence.
Q. How much do you pay for that station, and what is the number of it?
A. East 1810 is the number, and we guarantee $1.00 a month, and we have to pay a nickel each time we use it.
Q. Have you a contract with the Company for that phone?
A. I think not.

185 Q. How long have you had it?
A. Possibly two years.
Q. Is it a straight line?
A. I do not know.

J. A. HODGES, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?
A. J. A. Hodges.
Q. What is your occupation?
A. Insurance.
Q. With whom are you associated?
A. The United Order of the Golden Cross. I have charge of that association in Kentucky.
Q. Are you a subscriber for the service of the Cumberland Telephone Company?
A. Yes, sir.
Q. What kind of a phone have you, and where is it located?
A. 1349 Brook Street, a party line.
Q. What is the number?
A. South 1249 y, I think it is.
Q. How many subscribers on that phone?
A. Two.
Q. What do you pay for that phone?
A. $3.00 a month, less fifty cents for prompt payment.
Q. Is that known as a residence phone or a business phone?
A. Residence.
Q. How long have you had that phone in that house?
A. Nearly nine years.
Q. Have you any contract with the Cumberland Telephone & Telegraph Company?
A. Never have had.

186 C. F. WIMBERLY, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?
A. C. F. Wimberly.
Q. Please give us the place of your residence.
A. We have three numbers. The last number is 825 East Washington.
Q. You are a minister?
A. Yes, sir.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. Yes, sir.
Q. Tell us how much you pay, and the kind of service you have.
A. I have an individual phone, and the number is Main 1983.
Q. How much do you pay for it?
A. $2.00 per month by paying in advance.
Q. Have you any contract with the Cumberland Telephone Company?
A. No, sir.
Q. Yours is a straight residence line?
A. Yes, sir.

Q. How long have you had that phone?
A. It will be three years in October, I think.

Cross-examined by Mr. FAIRLEIGH:

Q. You are a minister of the Gospel?
A. Yes, sir.
Q. You know that you had the minister's rate?
A. No, sir; I don't know anything about that. I made application and called up and they said they would put a phone in for $2.00 per month by me paying in advance. The bill is always marked $7.50 with $1.50 for discount by paying it three months in advance, so that I get it for $2.00 per month.
Q. You knew it was the minister's rate?
A. I supposed that was it, but I made no ministerial deal.
187 Q. The Company knew you were a minister?
A. Yes, sir.
Q. And gave you a rate on that account, as they do all other ministers?
A. I suppose so.

M. VICTOR, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?
A. M. Victor.
Q. Where is your place of business?
A. 760 South Preston.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. Yes, sir.
Q. What kind of a phone have you?
A. I have a party line.
Q. What is the number?
A. South 423 y now.
Q. How many parties are on that line?
A. Two now. There use- to be three.
Q. Besides yourself?
A. No, sir; one more party besides myself, now.
Q. How much do you pay for that phone?
A. I pay now $15.00 less the discount.
Q. How much is the discount?
A. Fifty cents a month.
Q. You mean $15.00 a quarter?
A. Yes, sir; with a dollar and a half off for prompt payment for the three months.
Q. $13.50 net?
A. Yes, sir.
Q. How long have you paid that rate?
188 A. They have made so many different prices since I have had the phone—I have a record of it here.
Q. Give us the whole record.

A. I can go back as far as 1904. I have not gone back and farther than that. April 1st, 1904, I paid $7.50, but before that I paid less, I paid $1.50 a month before that, before 1904, but I only went from 1904 on.

Q. Give us what you have there.

A. That was $7.50 a quarter, with $1.50 off for prompt payment, making $6.00.

Q. How long did you pay that?

A. Until 1908.

Q. What time in 1908?

A. January 1st, 1908.

Q. Then what did you do?

A. They raised me.

Q. How many were on the line prior to 1908?

A. It was a three-party line.

Q. How much did they raise you in January, 1908?

A. They raised me to what I am paying now.

Q. How much is that?

A. $15.00 a quarter, less the discount as a residence phone. Then I went there and told them I thought I was entitled to be put in—to take the residence off and put me in as a business phone, because I am paying the business rate.

Q. Did they agree to do that?

A. They did, but they never did up until last month, and I told them they could take the phone out if they didn't put that in for me, and they put it in for me.

Q. At the same rate?

A. Yes, sir.

189 Cross-examined by Mr. FAIRLEIGH:

Q. What is the rate you pay now?

A. $15.00, less the discount.

Q. That is a regular party business line rate, is it not?

A. Not $4.00 a month.

Q. No, $4.50 per month, $13.50 per quarter?

A. No, $4.50 a month.

Q. That is what you have been paying since January 1st, 1908?

A. Yes, sir.

Q. Before that you were listed as a residence?

A. I was listed since that as a residence also.

Q. But before that you were listed as a resident rate?

A. Yes, sir; they had me in there as a resident, but they had me in the book as a resident since that.

Q. They charged that rate because you were in business there?

A. I always was in business.

Q. They charged it because they found you were in business there?

A. After I went down and told them. I went down a half a dozen times and told them to change it, and they didn't do it until the last month.

Q. You don't mean they changed the rate, but the listing in the book?
A. They changed the listing in the book.
Q. The old rate in 1904 was a four-party line rate, was it not?
A. No, I think it was a three-party line, but I might be mistaken about that. It might have been four, but I don't think it was four.
Q. It was the old four-party line rate?
A. Three-party line.
Q. There may not have been more than three on the line, but they might have put four on it, is not that true?
A. Very likely you might be right, but I think they only called it a three-party line, because they changed it to a two-party line now.

Q. You pay more for that?
190 A. For the two-party line.

Re-examined by Mr. QUIN:

Q. You do not know, of course, what rates the Cumberland charge with a two, three, four and five-party line, all you know is what you pay for the phone?
A. That is right.
Q. You have been in that place of business how long?
A. I have been there about eight years.
Q. The same place where the phone was first installed?
A. No, sir; I moved about four doors above.
Q. But in the same business?
A. The same business.

FRANK BIRCHLER, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

"—. Where do you live?
A. I live at 1058 Baxter Avenue.
Q. Are you a subscriber to the Cumberland Telephone Company service?
A. Yes, sir.
Q. What is the number of your phone?
A. Main 1722 a.
Q. Where is that located?
A. Campbell and Main. It is the second door above Campbell on Main.
Q. Have you a residence there too?
A. No, sir; I live at 1058 Baxter Avenue.
Q. Is your phone located in your place of business?
A. Yes, sir.
Q. How much do you pay for that phone?
A. I am now paying $5.00 a month, which is $4.50 by paying three months in advance, but last March a year ago they
191 raised me a half dollar for some time, making it $5.50, with a half dollar off by paying three months in advance. I don't

know just exactly how long since they raised it, but I think this is the third three months that I got the bill for to-day.

Q. How much is the bill to-day?

A. $15.00, less $1.50 a quarter.

Q. Is that a party line?

A. Supposed to be, but it is Main 1722 a, but it is not annoying. I had a party line before that that cost me $4.00 and it annoyed me a great deal. I think it was Main 785, the same number I had on the straight phone, and I had them change it, and they charged me $1.00 more.

Q. How many on this line now?

A. I could not say. I think mine is the first ring, because I never have any trouble.

Q. Have you any contract with the company?

A. As far as the contract goes, I think my contract is about run out.

Q. If you have a contract you don't know it?

A. If I have one, I don't know it.

Cross-examined by Mr. FAIRLEIGH:

Q. What is your business?

A. I am a Seed dealer.

Q. You say you were raised some time back from $4.50 to——

A. From $5.00 to $5.50.

Q. How did that happen?

A. I don't know. A man came up voluntee*r*ily and explained it. I don't remember now. He said they must have a half a dollar more, and I agreed to it all right. I said if they had to have more I would pay it, but he said if I paid three months in advance I would get that half a dollar discount.

Q. Was not that because you had an additional name in the book?

A. No sir, not that I know of. I never subscribed for any additional name.

192 Q. Who was this man that came up to you?

A. I would not know him if I saw him. He was a smoothe face man about fifty years old.

Q. Did he tell you why you had to pay the fifty cents?

A. He did, but I don't remember it. I didn't make much of it.

Q. You understood the reason?

A. I did at that time, but it has been so long ago I have forgotten about it.

Q. There was some reason?

A. I agreed to pay the rate.

Q. The reason was satisfactory?

A. Yes, sir.

Q. Has the business always been carried on under the name of Frank Birchler?

A. Yes, sir.

Q. Nobody else?

A. No, sir.

Q. Nobody else used the phone with you whose name you put in the book?

A. No, sir; just my own name on the phone.

Dr. HENRY HEUSER, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. You are a physician in the city of Louisville?

A. I am.

Q. Where is your office and residence?

A. I live at the Weissinger-Gaulbert, and my office is at the corner of Twelfth and Delaware.

Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. I am.

Q. What kind of a phone have you?

A. I have a party line.

Q. How many on the line?

193 A. Myself and another.

Q. Is the party line located at your office?

A. Yes, sir.

Q. How much do you pay for that?

A. $16.50 a quarter, less $1.50 for payment before the twelfth of the month.

Q. How long have you been paying that rate?

A. Since the first of the year.

Q. How much did you pay before that?

A. $13.50, less $1.50 for a main line. It was not a party line.

Q. You paid $5.00 a month before that?

A. $4.50 really. I am paying $5.00 a month now. I was paying $4.50 then and I got $1.50 discount for paying before the tenth or twelfth of the month, which netted $13.50.

Q. You are paying a half a dollar a month now more for a party line than you did for a straight line before that?

A. Yes, sir.

Q. How long is this contract for?

A. I don't know.

Q. Is it a written contract?

A. Yes, sir.

Q. Have you got it with you?

A. No, sir; I do not know that I have a contract for the last or not. They arbitrarily changed me. They told me I had to take it or they would take my line out.

Q. You had a contract prior to the first of the year?

A. Yes, sir; I have been having a phone for the last fifteen years. I had it when it was the old Ohio Valley Company. I have had a telephone ever since I have been in business, about eighteen or nineteen years.

Q. They told you the first of the year you had to take the party line or take it out?

A. I would have to pay a higher rate, I think $8.00 a month if I had the line as I did have it, or take a party line at $16.50 for the

three months. They just changed me from a single line to a
194 party line, and charged me fifty cents a month more.

Q. But they have no contract since the first of the year?

A. I think not. I think they just put it in. I don't remember having signed a contract. In fact, I don't remember of any contract except my first contract years ago. I may have it in my safe, but it has been so long I have just forgotten it, but I know that is the rate I have always paid.

Q. What is the number of your phone?

A. South 1044 y.

Cross-examined by Mr. FAIRLEIGH:

Q. How long have you had a party line?

A. The first of January of this year.

Q. 1909?

A. Yes, sir. I think that was when they changed it, when they made this general change. I don't remember whether it was the first of the year, but I think that was the time it went into effect. They made a sweeping change all over the city as to rates.

Q. Before that time, whatever time it was, you did not have a party line?

A. No, sir; my number then was South 3146.

Q. What was the rate?

A. $15.00 for three months, with a discount of $1.50 for payment before the tenth of the month.

Q. At the time you had this single line where did you live?

A. Weissinger-Gaulbert.

Q. All the time?

A. Not all the time.

Q. I mean this was not in your residence?

A. No, sir; I lived at the Louisville Hotel before I lived at the Weissinger-Gaulbert.

Q. How did it come about that you got a line at such a cheap rate for a single line?

A. That was the rate in existence as near as I can remember.

Q. You had a contract with the Ohio Valley Telephone Company?

195 A. Yes, sir; I had that at first and then the Cumberland absorbed that.

Q. And the thing continued on until the change was made?

A. I suppose so. I don't remember of any new contract being made. I would have to look through my papers and find it if there is. It has been so long ago I lost sight of it.

Q. Then you were changed to a party line and required to pay $16.50?

A. Yes, sir.

Q. With a discount of $1.50 per quarter?

A. Yes, sir; for payment before the tenth of the month.

Q. That was a larger rate than the ordinary business line was?

A. I do not know what the rates are, generally speaking. I only know my own rates.

Q. Did not somebody occupy the office with you?

A. I have two office partners.
Q. Was not their names put in?
A. Yes, and we paid fifty cents a name for each extra name.
Q. That was why the rate was larger?
A. What is that?
Q. That was why the rate was larger.
A. That is an individual affair.
Q. I understand, but that is included in the charge.
A. No, sir; that was extra. For instance, the line was in the name of the firm at $16.50—I mean $15.00, but for each extra name there was fifty cents.
Q. And that made it $16.50?
A. That was before the change had been made. I think I am right about that. I know the rate was made $15.00 a month for the name Dr. Heuser, Casper & Mulvey, and each name that appeared—for each name there would be fifty cents a month.
Q. The name of the firm was put in at the regular rate, Heuser, Casper & Mulvey?
A. Yes, sir.
Q. Then you wished the individual names put in?
196 A. Yes, sir; and they paid that extra, I thought.
Q. No, sir; it is all in your bill.
A. I did not know that.
Q. Will you look at the telephone book and see if the individual names are not in there?
A. I know they are.
Q. Did you ever hear of an individual paying anything?
A. I did not bother my head about that, I paid the bills and did not ask any questions.
Q. You knew you were paying the full bill?
A. I did not know I was paying for that. You have just called my attention to the fact, but I didn't know. I haven't thought of the matter. It never occurred to me. The bills come and I send a check for it, and that is all there is to pay, and where it used to be $15.00 I pay $16.50. I don't want to swear to that if I am mistaken, I may be mistaken.
Q. What was the date of your contract with the Ohio Valley Company?
A. That is so long ago I cannot remember, but I suppose it was fifteen years ago.
Q. What was the rate?
A. If I am paying $1.50 extra for the insertion of the three names, my rate is $15.00 for a party line, where it used to be $15.00 for a straight line.
Q. You pay more for the party line than you did for the straight line?
A. Yes, sir; in other words, I am paying at the rate of $30.00 for that line, where it used to be $15.00. I am paying at the ratio of $30.00 for the line where I used to pay $11.50.
Q. How long before January 1st, 1909, had your contract with the old Ohio Valley Company expired?
A. I don't know.

Q. It had expired before that contract?
A. I suppose.
Q. Will you get the contract and file it?
A. If I can.

197 WILLIAM RUBY, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. Where do you live?
A. Sherwood Avenue, 2064.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. I have a Cumberland Telephone since March, 1905, I think. I think it was the first of March, 1905, when I had it put in.
Q. What is the number of your phone?
A. It is 754.
Q. East?
A. Yes, sir.
Q. Any letter?
A. There was when I first had it. When I had a single line I had no letter, but last year when they added the party line they put the letter a.
Q. How much did you pay for that single line?
A. I had it put in when they put them in for $1.00 a month, and we had to use a dollar's worth of nickles a month, and if I didn't, I had to make it up; and if there was more in the box, all right. So I never bothered about it, when it was less than $1.00, I paid.
Q. You paid five cents for each call?
A. Yes, sir.
Q. Did the income in calls come free?
A. Yes, sir.
Q. All incoming calls were free?
A. Yes, sir.
Q. When was that changed?
A. Some time last year; I cannot tell you exactly; I said it was all right when they raised it.
Q. Have you a party line now?
A. Yes, sir.
Q. How many on that line?
A. I don't know.
Q. I there anyone else?
198 A. I don't know who the parties are on the line. I have never heard or found out, nor did I try to find out.
Q. How much are you paying for it now?
A. $1.00 a month.
Q. The same rate?
A. The same rate. If I don't have a dollar in the box, we have to make it up, or if there is more, all right.
Q. The only difference now is, that you have the letter on the number?
A. Yes, sir.

A. V. THOMPSON, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. A. V. Thompson.
Q. What is your occupation?
A. Manufacturer of clothing.
Q. Whereabouts?
A. Seventh and Main, southwest corner.
Q. What company?
A. The Kentucky Clothing Company.
Q. Is that Company a subscriber to the service of the Cumberland Telephone Company?
A. Yes, sir.
Q. How long has it been a subscriber?
A. I guess I have been in business twenty years, and I think I have had it all the time.
Q. What kind of service have you?
A. Number 753 a.
Q. That is a party business line, is it not?
A. Yes, sir.
Q. How many on that line?
A. One other, I understand.
199 Q. How long have you had that kind of service?
A. I could not state positively, but for a number of years.
Q. Have you a written contract with the company?
A. I do not attend to that. I did not know the object of this call and I did not look those facts up.
Q. How much do you pay a month for your telephone?
A. $4.00 a month.

(By consent, the witness called up his office and got the exact information from his books.)

Q. Can you tell us how much you pay for a month at present?
A. $5.00 gross, $4.50 net.
Q. How long have you been paying that rate?
A. The change was made from 1906 to 1907.
Q. How much did you pay before 1907?
A. $13.50 a quarter, gross; discount, $1.50, net $4.00 a month; we are paying net $4.50 now.
Q. Is that the same kind of a phone you had in 1906 and 1907, that you have now?
A. Yes, sir.
Q. Why was that change made?
A. I don't know.
Q. Did you ask that the change be made?
A. No, sir, I did not. About a year ago we remodeled our building and moved into our new office and got them to put in an extension up to the third floor, and it didn't work satisfactorily and we had them to take it out, but the change was made before that. We had nothing to do with the change. The change was made from 1906 to 1907. It was just an advance in rates.

Cross-examined by Mr. FAIRLEIGH:

Q. The old rate you paid before 1906-1907 was a party line?
A. Yes, sir; it was a party line. It has been a party line all the time.

200 Mrs. TIM MURPHY, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Mrs. Tim Murphy.
Q. What is your address?
A. 2707 Third Street.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. I was; I am not now.
Q. What kind of a service did you have?
A. We had a private line at first, $2.50, and they raised it to a party line, $3.00.
Q. Were those net prices?
A. How do you mean?
Q. Did you pay that much, or were you entitled to a discount?
A. I paid that straight.
Q. Did you have a contract with the company for either one of those phones?
A. No sir.
Q. What was the number?
A. South 412 a.
Q. You paid $2.50 a month for that straight line?
A. Yes, sir; and then afterwards with that party line we paid $3.00 a month.
Q. You have no phone now?
A. No, sir.
Q. When was it taken out?
A. In May. The reason we had it taken out, we had it five years and they gave it to us two months free of charge, and we paid them $2.50 a month then.
Q. For the five years?
A. A year and a half, and then they changed us to $3.00.
Q. Why did you take it out?
A. They said we owed $6.00, and we did not, and we had a dispute, and the gentleman insulted me, and I made him take it out.

201 Mrs. SUE M. DAVIS, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Mrs. Sue M. Davis.
Q. Where do you live?
A. 1025 East Main.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. I am, but I notified them a week ago to take it out. I do not

consider myself a subscriber now. I gave them a full week's notice to take it out.

Q. What is the number of the phone?

A. Main 1821 a.

Q. Have you a contract with the company?

A. I have had my phone eight or nine years. At first I had a contract and it held good, they say, for one year. I mean it does not hold good after one year.

Q. Did you have a written contract for one year?

A. Yes, sir. What I wanted to say was this, that I ran on the phone for eight years on up to last summer when I was going away for my vacation, and they were not giving me very good service, and I told them to take it out. I was tired of the price. They took it out two months, but they held my name. My business is Missionary worker, and I felt I had to have it, and I went back to them and they had me sign a lease like I had before. I don't know whether that will hold me or not, but I called on them to take it out.

Q. When was that signed?

A. It was put in the first day of November.

Q. Was that for a year?

A. Yes, sir.

Q. How much do you pay for that phone?

A. $3.00, with a discount of fifty cents.

Q. $7.50 a quarter?

A. Yes, sir; I pay in advance.

Q. How many on the line?

202 A. They told me just one other; I do not know.

T. J. JONES, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?

A. T. J. Jones.

Q. What is your occupation?

A. Superintendent of the Eastern Cemetery.

Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. Yes, sir.

Q. What kind of a phone have you?

A. Well, I have a party line. It is one of these paper phones. I had it put in when the Times—I took the Times and they put in the telephone.

Q. How much do you pay for it?

A. One dollar at that time to install it.

Q. One dollar a month?

A. No, sir; just for the installation.

Q. How much did you pay a month?

A. I didn't pay anything; I only paid a nickel whenever I used it.

Q. Did you guarantee any certain amount a month?

A. No, sir.

Q. How much do you pay now?

A. Only a nickel when I use it.
Q. Incoming calls are free?
A. Incoming calls are free.
Q. What is the number of your phone?
A. 985 y.
Q. Have you any contract with the company?
A. None whatever.
Q. Is that a party line?
A. Yes, sir.
203 Q. How many on it?
A. I don't know.

J. H. SNYDER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. J. H. Snyder.
Q. What is your occupation?
A. Cashier for The Russel & Company.
Q. Where is your place?
A. Fourteenth and Maple.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. My company is.
Q. What kind of a phone have they?
A. It is called a two-party line, but it is just one phone.
Q. Is it a business phone?
A. Yes, sir.
Q. What is the number?
A. Main 1432 a.
Q. What do you pay for that phone?
A. $15.00 a quarter, with a discount of fifty cents a month, payable three months in advance.
Q. How long have you been paying that rate?
A. I do not know.
Q. For sometime back?
A. For a year and a half or two years, something like that. I cannot tell from the books, as I pay the Long Distance calls in connection with my telephone bills, and I send all the bills to the factory.
Q. You say no other person is on that line?
A. No, sir; no other person.
Q. How long have you been the only person on that line?
204 A. Since they changed the rate.
Q. When did they change the rate?
A. About a year and a half, or two years ago.
Q. What was it then?
A. My best recollection is, it was $4.50 a quarter, subject to a discount of fifty cents a month, payable three months in advance.
Q. Did you have a straight line, or a party line?
A. Straight line.

Q. Since that, there has been no one else on the line?
A. No, sir.
Q. Why do you call it a party line?
A. They threw up the contract to the best of my recollection—our contract reads that it can be a party line if the company desires to put another person on it.
Q. Did you have an agreement with them?
A. I think the contract certified that.
Q. Did you have any outside agreement with them?
A. I think not.
Q. Have you a copy of the contract?
A. No, sir; I don't think the company ever had a copy.
Q. They never gave your company a copy of it?
A. No, sir.

205 J. C. TARRANT, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. J. C. Tarrant.
Q. What is your occupation?
A. President of the Fishbach Carpet Cleaning Company
Q. Is your company a subscriber to the service of the Cumberland Telephone Company?
A. Yes, sir; so understood. It was before my time.
Q. Do you take the Cumberland Telephone now?
A. Yes, sir.
Q. What is your number?
A. 732 a.
Q. What kind of a phone is it?
A. Long Distance.
Q. Is it a straight line, or a party line?
A. It was supposed to be a straight line, but the addition was put on unbeknown to me.
Q. What are you paying for that telephone?
A. $5.00 a month.
Q. Net?
A. Twenty dollars for an advertisement and $5.00—what is that, I can't tell—$5.17 net. I don't know what the seventeen cents is for, but the $20.00, that is for advertising which has nothing to do with the other.
Q. How long have you been paying that rate?
A. For four years.
Q. Who else is on the line besides you?
A. That I couldn't say. I think it was a party on Seventh Street.
Q. How long have you been on that line?
A. I could not say. It was put on unbeknown to me.
Q. Have you any contract with the company?
A. I had, but the contract ran out.

206 Q. When did it run out?

A. I do not know, several years ago; four years ago, at any rate. I can speak for it for four years.

Q. Are you paying any different rate than what you did before the party was put on the line?

A. No sir, the rate is the same.

C. TROXLER, called for the defendant, being duly sworn and examined, deposed as follows:

Q. What is your name?

A. C. Troxler.

Q. Where do you live?

A. 1530 Second Street.

Q. Where is your business?

A. Southeast corner of Third and Breckinridge.

Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. I am.

Q. What kind of a phone have you?

A. I have now a pay station.

Q. How much do you pay for that?

A. It depends altogether on how much the box contains. I guarantee $4.00 a month. If the box contains less than $4.00, I have to make up the amount, and if it contains more, I am to get fifty per cent. of the surplus.

Q. What does that average you?

A. I have not had it but about a few months. It pays for itself, a little more.

Q. It pays you?

A. Yes sir, I think I got ninety cents last month.

Q. What kind of a phone did you have prior to that?

A. That was put in as a party line. That was the understanding, but the understanding between myself and the company's agent was,
207 that it should be a party line, and they gave me the old number, 954, and they said they would put a after the number. I was to be 954 a. I agreed to take the telephone under those circumstances, but I told them I did not want any party line, and as soon as they put anybody else on the line I would want the telephone taken out. I understood other people had been getting the same service that I was paying $6.50 for for $4.50. I had that telephone in four or five or six years and I was paying $4.50 a month, I believe the net amount was $4.00.

Q. Why did you make the change to a pay station?

A. They required it.

Q. Didn't they have anybody else on that line while you had it?

A. Never.

Q. You told them if they would put anybody else on you would take it out

A. Yes, sir. I would not have a party line. I would rather pay $10.00 a month for a single line.

Q. It remained that way until you had the pay station put in?
A. Yes sir.
Q. Nobody else put on the line?
A. No sir.

M. J. DOLL, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. M. J. Doll.
Q. Where is your place of business?
A. Baxter Avenue; 623 new number; old number, 1219.
Q. What position do you hold with the Doll Grocery Company?
A. I own the concern. I am the proprietor.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. Yes sir; I have two phones at present.
Q. What are the numbers?
208 A. East 219 and East 221 a.
Q. East 221 a is the old phone?
A. Yes sir; and I had 219 put in probably a year ago.
Q. What do you pay for the straight line?
A. I think $7.50.
Q. Net?
A. Yes sir; $8.00, with fifty cents discount.
Q. What do you pay for the party line?
A. Five dollars, less fifty cents.
Q. Have you a contract covering either one of those installations?
A. I don't remember whether I have a contract for the last year. The other one I have not. I think I did make the contract. I think that was the only way they would put it in.
Q. How many people on the East 221 a?
A. None. I had the same experience this last gentleman had. I was told of other people going to them and telling them they would take the phone out, that they didn't want one. They said they would put me on the line with two parties, but would not put anybody on the line, and I gave them written notice that whenever they put anybody else on it to take it out.
Q. And no one else was put on it?
A. No sir.
Q. How much do you pay?
A. $5.00, less fifty cents.
Q. So far as the service, it is just the same as a straight line?
A. Yes sir; I get the same service out of one as out of the other.

209 JACK MARX, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your occupation?
A. Hide and wool merchant.
Q. Where is your place of business?

A. Brook and Main.

Q. Are you a subscriber to the service of the Cumberland Telephone Company?

A. We are.

Q. What kind of a phone have you, and what is the number?

A. The number at present is 4738 a. It is a party line, two on the line.

Q. Have you a contract with the company?

A. I do not know whether we have or not. I hardly think we have.

Q. How much do you pay for that phone?

A. We have an attachment on the phone, an extra bell, and for the bell and phone they are charging us $15.45 per quarter, less the discount of $1.50.

Q. How long have you been paying that rate?

A. You have got me again; if I am not mistaken, for January, February and March, 1909.

Q. What did you pay before that?

A. We had the same number, and, to my knowledge, we were paying $12.00 for the party line.

Q. Twelve dollars a quarter?

A. Yes, sir.

Q. Any discount on that?

A. $1.50 discount.

Q. Why was that change made to the higher rate?

A. The company just claimed they had to charge a higher rate, that they were charging higher rates all over town. On the resident phone we had a straight line—no, it is not either. The number on the residence phone was 5724 m, and we were paying
210 $9.00 at that time, and I had a straight line and I was paying $7.50 for it.

Q. Was that net, or subject to a discount?

A. It was subject to a discount, and so was mine. Both my father's and mine was subject to a discount.

Q. Have those two been changed?

A. Yes, sir; they are charging me now for the phone $9.00, whereas I formally paid $7.50.

Q. What are they charging your father?

A. $9.00, less the discount of $1.50.

Q. Yours is subject to a discount of $1.50?

A. Yes, sir.

Q. In other words, you are both paying higher rates than formally?

A. Yes, sir.

Q. Have there been any parties added to your phone at your place of business?

A. None whatever.

Q. The same number on the line that you had prior to January, 1909?

A. Our former number was 3304 m on the business phone, and they took that number from us and put us on another line. We were then on a party line, but since that they arranged it to suit

themselves. We asked them to make both phones the same number, and they gave me the number and put Dr. Eisenman on the line and we are having the same service we had prior to 1909.

Cross-examined by Mr. FAIRLEIGH:

Q. You have spoken of different rates you paid from your father's residence rate.

A. Yes, sir.

Q. Where did you live?

A. 306 East Kentucky. I never noticed this before.

Q. Where did your father live?

A. Fifth and Breckinridge; 1017 Fifth Street, and I lived at 300 Kentucky.

211 Q. Did you ever notice before the different rate between you and your father?

A. I never took notice of it.

Q. How did that come about?

A. I never noticed these rates from 1907, $12.00, $9.00, $7.50. I looked for the other bills and I couldn't find them. I don't think we received receipts except for tolls, but I have the stubs for the checks that we paid them.

Q. Is there any possible explanation for that?

A. I cannot explain it at all.

Q. You knew all the time what your father was paying?

A. To tell you the truth, I never watched what he was paying. I have been watching my own.

Q. How did you get these bills?

A. By looking them up to bring them down this morning.

Q. Did he pay his bills, or you?

A. It was all paid at the store. I took mine in and had it charged to my account, and his was charged to him.

Q. The book-keeper paid?

A. We have no regular book-keeper. We have a stenographer, and I told her to make out a check for the telephone bills, and she looked up the account and paid it.

Q. You are paying the same rate now?

A. Yes sir; the new bills are unpaid as yet, and they show that we are paying the same rate.

Q. How far back are the new bills?

A. I just have three with me. They always send back the receipts for the tolls, but I have never got these blue receipts back from them and I don't understand that. I have looked back as far as April, 1907, and I cannot find any receipts that I got from them. Of course I could go and ask for that, no doubt, and get duplicates.

Q. I am trying to find out why the difference between your father's and yours.

A. I don't know, but I can show it to you on these bills.

212 (The bills were here produced by the witness.)

Q. Was your telephone put in at your residence before or after your father's?

A. My father had a telephone long before I had.
Q. He had an old rate?
A. Yes, sir; I had my telephone moved from 1414 Transit Avenue. The first year after I married I lived at 1414 Transit Avenue, and then I moved to 300 Kentucky.

JOSEPH M. ALLEN, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name:
A. Joseph M. Allen.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. I am not now.
Q. Were you?
A. Yes sir.
Q. What kind of a line did you have, and where was it located, and what was its number?
A. The number of the phone I don't remember.
Q. Was it Main 3861 y?
A. Yes sir.
Q. Where was it located?
A. 655 Fifth Street.
Q. What kind of a phone was it?
A. Cumberland phone.
Q. What class of service?
A. Pay station.
Q. What did you pay for that?
A. At the beginning, I paid $2.00 to have the service put in, and they gave me $1.00 worth of checks which amounted to four cents, and I used them and kept that up for, I think, two years,
213 and after that time they told me from that time on I would have to pay five cents for each call, like anybody else.
Q. Did you pay that?
A. Yes, sir.
Q. Why haven't you got it in now?
A. I had it taken out. I had no use for it.
Q. All incoming calls were free?
A. Yes, sir.
Q. Did you guarantee any payment?
A. I had to guarantee $1.00 in the box.
Q. How many people on the line?
A. I do not know anything about that.
Q. Did you have any written contract with the company?
A. At the beginning.
Q. But not after that?
A. No, sir.
Q. How long did that contract last?
A. One year.

FRANK ZIEGLER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Frank Ziegler.
Q. Where is your place of business?
A. Shelby and Burnett.
Q. Are you a subscriber to the Cumberland Telephone service?
A. Yes, sir.
Q. What is the number of your phone?
A. 2592.
Q. Is it a party line?
A. I think it is. I think there are four on that line.
Q. What kind of a line is it?
A. It is a drop-the-nickel in.
214 Q. A pay station?
A. Yes, sir.
Q. Have you unlimited service as long as you pay five cents a call?
A. Yes sir, anybody who wants to.
Q. How much do you guarantee?
A. Ten per cent.
Q. How much do you guarantee to pay the company?
A. Nothing; they guarantee me ten per cent.
Q. Explain that.
A. They give me ten per cent. of what the phone takes in.
Q. What do you get?
A. Not over a dollar or $1.50 a month.
Q. Do you get ten per cent.?
A. Yes, sir.
Q. You pay five cents per call.
A. Yes sir, if I use it.
Q. And they don't charge you anything for people calling you up.
A. No, sir.
Q. What kind of business do you run?
A. Grocery and meat store and saloon.
Q. Have you a written contract with the company?
A. No, sir.
Q. How long has that arrangement been obtaining?
A. I could not say; ever since I have been in there.
Q. How long is that?
A. I could jusge five or six or seven years, to the best of my recollection.

215 Mrs. ALICE BLACK, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. Where do you live?
A. 109 East Chestnut.
Q. Have you a Cumberland phone in your residence?
A. Yes, sir.
Q. What is the number of it?
A. 2842 y.

Q. How many on that line besides yourself?
A. I do not know how many. They call it a party line too, but I am not at all annoyed by the parties on it.
Q. Do you have more than one ring on the line?
A. It don't ring at all.
Q. How do you know when you are called?
A. I go when it rings. There are other people on the line. I have taken the receiver down and have heard other people talking.
Q. Have you a written contract?
A. No, sir.
Q. How much do you pay?
A. $3.00 a month, and they give me a discount of fifty cents.
Q. $2.50 net?
A. Yes, sir.
Q. How long have you been paying that rate?
A. Just a short time.
Q. How much did you pay before that?
A. $2.50.
Q. The same kind of service?
A. A single line.
Q. Was it $2.00 or $2.50?
A. $2.50, and I got the discount, and that made it $2.00, but I had a single line then.
Q. You are paying more now for a party line than formally you paid for a straight line?
A. Yes, sir.

216 Cross-examined by Mr. FAIRLEIGH:

Q. How far do you live from the Exchange?
A. On Chestnut between First and Brook.
Q. That is within a mile of the Telephone Exchange?
A. Yes, sir.

HOWARD M. GRISWOLD, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Howard M. Griswold.
Q. What position do you hold?
A. President of John P. Morton & Co.
Q. Are you a subscriber to the service of the Cumberland Telephone Company?
A. Do you mean the Company?
Q. Yes.
A. Yes.
Q. How many phones have you, and what are their net prices?
A. Two main lines, number 532 and number 580.
Q. That is known as straight business line service?
A. Yes, sir.
Q. No parties on the line besides yourself?
A. No, sir.

Q. What are you paying for that service?

A. We are paying every three months $64.50 for that service—for the whole service. That is, for both lines.

Q. How much are you paying for your trunk lines?

A. One of them is $6.50 a month and the other is $8.00, less fifty cents a month, I believe.

Q. How much are you paying for the extensions?

A. I do not know, and I have been figuring at it quite a while, but I cannot find out what I pay except that I know in the aggregate what I pay. I have two contracts. We have eight extensions
217 on the two trunk lines.

Q. How much discount is allowed you on your bill?

A. This is the net amount that I have mentioned. That is the net amount we pay.

Q. Do you know how much discount you are allowed?

A. No sir, I don't know anything about the discount allowed.

Q. The difference between the contract price for the trunk lines and your total bills is for the extension?

A. Yes, sir.

Q. You say you have a written contract with the company?

A. I don't know whether it has expired or not. One of them I think has expired, except that it may run until it is annulled, but I have two contracts, one dated November 18th, 1902, and another October 4th, 1906.

Cross-examined by Mr. FAIRLEIGH:

Q. Have you copies of those contracts with you?

A. I have not copies; I have the originals.

Q. You don't want to part with them?

A. No, I don't know that it will do any good to keep them, but I don't care about giving them up.

Q. How many trunk line telephones have you?

A. Two, number 580 and 532.

Q. For one you pay how much?

A. $6.50, and the other is $8.00, less fifty cents a month, which is $7.50.

Q. You said you had two contracts and gave the date of them.

A. Yes, sir.

Q. Was one given in substitution of the other?

A. No sir; the second was when I took in the second main line. We had one originally, and then I added another.

Q. Have you a private branch exchange?

A. Yes sir.

Q. This is a private branch exchange contract?

A. One of them is, and the other is not.

218 Q. The last contract you made was the private branch exchange?

A. It covered that private branch exchange.

Re-examined by Mr. QUIN:

Q. Are all eight stations connected with one telephone, or with both?

A. No sir; we cannot connect on the one.

W. S. WHITESIDE, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. W. S. Whiteside.
Q. What is your occupation?
A. Manager of Whiteside's Bakery.
Q. Are you a subscriber to the Cumberland Telephone service?
A. Yes, sir.
Q. What kind of a telephone?
A. We have one trunk line, one phone, one extension.
Q. What do you pay?
A. $24.00 for three months, less $3.00.
Q. What do you pay for the extension?
A. $3.75 for three months.
Q. Any discount on that?
A. No sir; the discount is on the trunk line. I just got this bill in this morning.
Q. How long have those rates been prevailing?
A. We moved into our new bakery about a year ago.
Q. Did you have the same rates as before?
A. At the old place I had a switchboard, and they tried to soak me for a higher price, and I wouldn't stand it and I took the Home service.
Q. What is the number of your telephone?
A. 2319 Main.

219 I. W. BERNHEIM, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. I. W. Bernheim.
Q. What is your occupation?
A. I am a Distiller and Wholesale Liquor Dealer.
Q. What connection have you with the Bernheim Distillery?
A. I am President.
Q. Is your company a subscriber to the telephone service of the Cumberland Telephone Company?
A. Yes sir.
Q. How many lines have you?
A. We have one main line, and then we have a line to the distillery out on Seventh Street.
Q. Have you any private branch exchange at your place of business?
A. No sir.
Q. How many connections of branches have you?

A. We haven't any.
Q. At your place of business?
A. No sir.
Q. No extensions of any kind?
A. No sir.
Q. What do you pay for your trunk line?
A. It may seem strange but I don't know. That is in a department that I am not so familiar with.

(The witness was directed to telephone and get the information, and he then answered):

A. We only have a Cumberland in our Main Street house, and we haven't got it to our distillery at all. We pay $8.00 a month, less fifty cents discount.
Q. Have you a contract with the company?
A. I am not familiar with that; I cannot say.
Q. Do you know how long you have been paying that rate?
220 A. I am not familiar with that. I am sorry I am not prepared to answer these questions. The man who summoned me said I should come to the City Attorney's office, and I didn't know what they wanted.

GEORGE G. BROWN, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your occupation?
A. Distiller and wholesale liquor dealer.
Q. You are with J. P. S. Brown & Sons?
A. No sir; I am President of the Brown-Forman & Company.
Q. Is that company a subscriber to the service of the Cumberland Telephone Company?
A. It is.
Q. How many lines have you?
A. We have one trunk line and six stations. The bill for the trunk line is $8.00 per month, making $24.00 for three months, and for the stations it is $1.50 a month, making $27.00, and there is a discount of $10.50 from the above amount.
Q. A discount of $10.50 a quarter?
A. Yes sir.
Q. That would be net $40.50 for the quarter?
A. Yes sir, it is.
Q. That is a single business line? It is not a party line?
A. No.
Q. What is the number of the phone?
A. Main 307.
Q. Have you any written contract with the company?
A. I expect we have, but I have not it with me.
Q. How long have you been paying those prices to the Cumberland Company?
A. I could not tell you. My impression is, if you want that, that

my son has given a deposition in this matter and probably
221 has filed some of those.

Q. He gave an affidavit?

A. Is that it?

Cross-examined by Mr. FAIRLEIGH:

Q. You say you have a written contract with the company?

A. I presume so, but I am not positive.

Q. Do you know the terms of the contract?

A. I have no idea. This is all the information I have at hand. I could not find any of the documents and the bookkeeper was out. I did not think about getting this until just before leaving, and my son told me something about having given a deposition, and I just rather assumed from something he said he might have had all these documents, as I did not find them.

Q. How many lines have you?

A. One trunk line and six stations, that is six extensions, I suppose, to various parts of the building.

R. E. WATHEN, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?

A. R. E. Wathen.

Q. What connection have you with R. E. Wathen & Company?

A. I am President of the Company.

Q. Is your company a subscriber to the Cumberland phone?

A. Yes sir.

Q. What is your number?

A. Main 105.

Q. What kind of a phone, a straight business line?

A. Yes, sir.

Q. What do you pay for that phone?

A. I have just been informed over the telephone that we pay
$24.50 three months in advance, and $7.50 additional for
222 two extensions, with a discount of $4.50, making the net amount $27.50.

Q. How long have those rates been prevailing?

A. I couldn't say.

Q. Have you any written contract with the company?

A. I couldn't say about that. My brother attends to that, and he is out of the city now.

Cross-examined by Mr. FAIRLEIGH:

Q. You have three extension sets?

A. Two extensions from the main line. There are three phones in the office.

Q. Three instruments?

A. Yes sir, three in all.

Dr. VINCENT DAVIS, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your occupation?
A. Vinegar manufacturer, the Eclipse Vinegar Works?
Q. Is your company a subscriber to the Cumberland Telephone Company service?
A. Yes sir.
Q. What kind of a telephone have you?
A. Pay station.
Q. What do you pay for that?
A. $4.00 a month.
Q. You guarantee that much?
A. Yes sir.
Q. How much does it cost?
A. If I call over the phone it costs me a nickel.
Q. Do you get any part of the proceeds over and above $4.00?
A. Yes sir; if there is anything over $4.00.
Q. Is there anything ever over the $4.00?
A. Never has been. If it would be it would be very small.
223 Q. Where is your place of business?
A. Thirtieth and Broadway.
Q. How long have you had that phone?
A. About six months. I have had a Home phone ever since I went into business, until six months ago.
Q. The incoming of calls are free to you?
A. Yes sir; I made the change because I have a Cumberland at home and I wanted one down there.

MAX SCHIMPELER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Max Schimpeler.
Q. What is your occupation?
A. Saloon business.
Q. Whereabouts?
A. 622 Baxter Avenue.
Q. Have you got a Cumberland Telephone?
A. Yes sir.
Q. What is the number?
A. 768 East.
Q. Is it a party line or a straight business line?
A. I could not tell you. I think it is a straight business line.
Q. What kind of phone is it?
A. A pay station.
Q. How much do you pay for that?
A. I don't pay anything.
Q. What does it cost you to talk over it?
A. Five cents.
Q. Do you guarantee any certain amount?
A. No sir.

Q. Do you get any part of the proceeds?
224 A. They promised me ten per cent, but we never have received enough for me to get anything on it.
Q. You have never gotten anything out of it?
A. Maybe six or seven cents, or five cents a month. I never paid much attention to it.
Q. How long has that been in there?
A. Pretty near three years.

ARTHUR H. PARTRIDGE, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your occupation?
A. I am agent for the Stizel Brewery Company.
Q. Is that company a subscriber to the Cumberland Telephone Company?
A. Yes sir.
Q. What is the number?
A. West 99.
Q. A straight line or a party line?
A. Straight line.
Q. How much do you pay for that?
A. I just asked my cashier. We get a bill of $27.00, with $3.00 discount.
Q. Have you any extensions?
A. We have one desk phone. We pay $1.00 extra for that.
Q. Have you a contract with the company?
A. Not to my knowledge.
Q. Do you know how long you have been paying those rates?
A. No, I could not say as to that. I could find out; I did not know what you wanted exactly.

Cross-examined by Mr. FAIRLEIGH:

Q. You have no accurate knowledge of what you pay?
225 A. Certainly I have, but I don't quite remember. I know there is a discount of $3.00, and I think we pay $1.00 a month for the extension. I think we pay $24.75 every three months.
Q. But you are not at all sure you are accurate?
A. I am sure that is what we pay, $24.75 a month.
Q. How many phones have you there?
A. Two, one straight line and I have a desk phone.

Re-examined by Mr. QUIN:

Q. If you find the figures you have given are not correct, will you notify the stenographer and correct them?
A. Yes sir.

J. M. SCHOENBAECHLER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. J. M. Schoenbaechler.

Q. Where is your place of business?
A. Southwest corner of Preston and Kentucky.
Q. Are you a subscriber to the Cumberland Telephone service?
A. Yes sir.
Q. What is the number of your phone?
A. 3070 South.
Q. Is that a straight business line telephone?
A. Yes sir.
Q. Is it not a pay station?
A. Yes sir; it is now all together.
Q. How long has it been that?
A. Even since they changed it about three months ago.
Q. What were you paying before that?
226 A. I was paying quarterly $10.50, $4.00 a month, with fifty cents discount.
Q. How much did you guarantee the company?
A. $4.00 a month.
Q. Did you get any of the proceeds over and above that?
A. Yes sir.
Q. How much?
A. Fifty per cent.
Q. What does that amount to?
A. I don't know. If there is $5.50 in the phone box I get fifty cents.
Q. How much do you get out of the phone a month?
A. I have never *for*gotten anything. I have always had to add to it. They don't count the long distance money either, just the local calls. I think there was $3.45 in the box, I couldn't say exactly, but something around that in the box yesterday, and I had to pay $1.45 additional to it because I never get anything from the long distance calls. They don't figure at all.
Q. Have you a contract with the company?
A. No sir.

JOHN B. BASKIN, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. John B. Baskin.
Q. What is your business or profession?
A. Lawyer.
Q. What firm are you associated with?
A. Bodley & Baskin.
Q. Do you subscribe for the Cumberland Telephone service?
A. My firm takes the Cumberland.
Q. What kind of service have you?
A. Pretty good.
227 Q. Is it a party line or a straight line?
A. A straight line.
Q. How many extensions have you?
A. One telephone—on January 31st, 1902, my firm was then Bodley, Baskin & Flexner and we entered into a written contract

with the Cumberland Telephone & Telegraph Company on that date for one trunk circuit switchboard in the general office and for three private desk telephones extending to the rooms of each member of the firm. We were to pay $6.50 per month, or $19.50 per quarter in advance for the trunk circuit, and $2.50 per month for the station and extensions. Since that contract was made we have put in the fourth extension at the same rate, which amounts to $19.50 quarterly in advance for the trunk circuit and $10.00 quarterly in advance for the extension, a total of $29.50. I find no renewal of that contract, but the contract did provide that it was for the term of three years, and until the agreement is terminated by thirty days' notice in writing given by either party to the other. Several years ago, while William W. Crawford was in our office, we had his name also put in the telephone book and the charge was then increased by the whole service, including his name, to $30.00 per quarter, payable in advance. Mr. Crawford has since left our office. On yesterday we received a bill for $29.00 for the months of July, August and September, 1909, and paid the same, so that we are receiving service under the original contract, no notice of cancellation having been given, and our rate is $29.00 per quarter, payable in advance without the name of Mr. Crawford in the telephone book.

Q. What is the number of your telephone?

A. Main 114.

228 W. E. WINKLER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?

A. W. E. Winkler.

Q. Where is your place of business?

A. Wenzel and Washington.

Q. Have you a Cumberland telephone in your place?

A. Yes sir.

Q. What kind of a phone is that, a straight phone or a party line?

A. Straight line.

Q. Pay station, is it not?

A. Yes sir.

Q. What do you pay for that phone?

A. I am guaranteeing $4.00 a month.

Q. Any discount from that?

A. No sir.

Q. Do you ever get any part of the proceeds from that phone?

A. I did at one time.

Q. When did you stop getting a discount?

A. I think it was the first of April or the first of May, I do not remember the date exactly. It was either the first of April or the first of May.

Q. What part of the proceeds did you get prior to that time?

A. Prior to that time I got half of all over $4.00.

Q. Did that average you anything?

A. Yes sir, I would get $1.50 down as low as fifty cents.

Q. That was over and above your $4.00?
A. Yes sir.
Q. You paid five cents for each call you made?
A. Now I do. Then I didn't pay nickels at all.
Q. Prior to the time of the change, instead of paying you got paid?
A. I paid them $4.00 a month—$12.00 a quarter, less $1.50.
Q. Did you get part of the proceeds then?
229 A. Yes sir.
Q. Did the proceeds amount to fifty cents over and above the amount you paid?
—. Every month.
Q. So, as a matter of fact, instead of being out anything for having the telephone, you were in?
A. Of course, it cost me something.
Q. And you used it whenever you wanted to?
A. Yes sir.
Q. Have you a written contract with the company?
A. No sir.
Q. Did you have at that time?
A. No sir.
Q. Why was the change made?
A. I do not know why, but the gentleman told me they had to make the change, and I won't say positively whether it was the first of April or the first of May, but I think the first of April.
Q. What is the number of your phone?
A. Main 579.

Cross-examined by Mr. FAIRLEIGH:

Q. How was that change made?
A. A representative came to me and told me of the change.
Q. When was this?
A. Some time in March.
Q. Since that time has there been any months where the amount ran over $4.00?
A. No sir; at the present time I am guaranteeing $4.00 a month.
Q. You are entitled to fifty per cent beyond that?
A. No sir, not anything; I was.
Q. Not since that man told you that?
A. No sir.
Q. But you have had no illustration of it by having your box produce more than $4.00?
A. No sir; I understand the box prior to April—I am
230 most sure of this—I paid them $4.00 a month and $1.50 discount three months in advance, and I got half of what was in the box, and now I have to guarantee them $4.00 and I don't get anything of what is in the box at all.
Q. The fact is, you guarantee $4.00 and have to live up to it, and if it don't make $4.00 you make it good?
A. Yes sir.
Q. And if it makes over $4.00 you are entitled to fifty per cent?

A. I would not deduct that, but I would have half of what was over that.
Q. Have you any written contract?
A. No sir.
Q. You are entitled to half over $4.00?
A. It has never been over $4.00.
Q. That is right?
A. I don't know.

LEWIS ATWOOD, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Lewis Atwood.
Q. What position do you hold with the Peaslee-Gaulbert Company?
A. I am President of the Company.
Q. How many Cumberland telephones have you?
A. We have what is called a four-trunk line that runs into our private branch exchange, and from that exchange the service is distributed over the house through medium of fifteen individual stations.
Q. What do you pay for those trunk lines?
A. We pay $6.50 each month.
Q. What do you pay for each station?
231 A. Eighty-three and a third cents per month.
Q. Is there any discount from those prices?
A. No sir. In addition to that, we have five private lines that is communicating from five stations in our store to our warehouses.
Q. What do you pay for those?
A. For the five, $5.50 per month.
Q. For the entire five?
A. Yes sir.
Q. Any discount from that?
A. No sir.
Q. What is the net amount you pay the Cumberland?
A. $47.66.
Q. Have you a written contract?
A. No contract.
Q. How long have you been paying those prices?
A. I cannot answer it, but I think for several years. I could inform myself by looking up. I know we have been doing it for several years.
Q. What is the number of your phones?
A. I always call 1819, without looking at the book.

GEORGE AUFENKAMP, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. Where is your place of business?
A. First and Broadway.
Q. Grocery?
A. Yes sir.

Q. Have you a Cumberland phone?
A. Yes sir.
Q. Pay station?
A. No sir.
232 Q. Didn't you have a pay station?
A. Yes, sir.
Q. How long did you have a pay station?
A. Probably seven months.
Q. When was it taken out?
A. First of April.
Q. What kind of a pay station?
A. I paid $10.50 a month with a discount—$12.00 a month.
Q. You mean $12.00 a quarter with a discount of fifty cents a month?
A. Yes sir.
Q. Making $10.50 net?
A. Yes sir.
Q. Did you have to pay five cents in addition for a call?
A. No sir.
Q. Did you get any part of the money taken in?
A. I got fifty per cent.
Q. You had free use of the telephone?
A. I had free use for $4.00 a month, and fifty cents off if I paid in advance.
Q. Was there any proceeds of the telephone that you received?
A. Fifty or sixty cents a month.
Q. That was credited on your bill?
A. No sir, I received that in cash.
Q. What have you now?
A. Straight line.
Q. What do you pay for it?
A. $8.00.
Q. Have you a contract?
A. Only thirty days.
Q. Why was that telephone changed?
A. The agent or representative of the company said the telephone didn't pay them, didn't pay as good as $4.00 a month, and they wanted to put in a straight pay station, and I could not afford to do that because I don't use the phone myself, but some of my
233 trade come in and I couldn't ask them to pay five cents to use the telephone.
Q. Before this change was made did they have to pay five cents a call?
A. I would call for them.
Q. They didn't have to pay anything for that?
A. Not if I called for them.
Q. That paid them over $4.00 a month, did it not—you say it paid $3.50 and you got sixty cents?
A. If I didn't take the discount it would pay $4.00.
Q. Was that a party line you had prior to April?
A. No sir; a straight line.

Q. What have you now, a straight line?
A. Straight line.

Cross-examined by Mr. FAIRLEIGH:

Q. When you had the pay station, the agreement with the telephone company was, you would guarantee $4.00 a month, and that you yourself would have free service, and that you would have fifty per cent of the net amount the pay station received beyond $4.00?
A. I don't think any amount was mentioned as a guaranty. If it was, it was not mentioned in the contract.
Q. You don't remember what the contract was?
A. I was to pay $4.00 a month for the telephone for my use, for my private use in my business. Anybody else would pay five cents.
Q. But you were in the habit of calling for others?
A. Only in case of my business. Some lady would come in and order some meat and maybe she would leave the house and tell the cook and tell her she was going to get one thing, and then get another, and she would want to call the cook and tell her.

234 F. M. FISHER, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. F. M. Fisher.
Q. With what company are you connected?
A. The International Harvester Company.
Q. What is your position?
A. General Agent.
Q. Have you a Cumberland Telephone there?
A. Yes sir.
Q. What is the number of it?
A. 1011.
Q. Is that a straight line?
A. Yes sir; there is one trunk line and we have three desk phones in addition.
Q. How much are you paying for that phone?
A. We are paying $6.50 a month, $19.50 a quarter.
Q. That is, for the trunk line?
A. Yes sir; and $7.50 for the three desk phones.
Q. Is there any discount in those prices?
A. Not that I know of. I don't believe there is.
Q. Have you any contract with the Cumberland Telephone Company?
A. I really don't know whether we have or not. I came here about eighteen months ago and I cannot tell whether we have or not. They came down about a year ago and wanted to make changes that I didn't want made. I believe they claimed that our contract had expired, and I told them that if it had, and they insisted in making certain changes, they could take it out, because for city use we were paying $27.00 for service that is not any earthly use to us. The Long Distance calls is what we want.

Q. What kind of service did they want to install?

A. I really don't know. What we ought to have had is two trunk lines, there are so many Long Distance calls come in and out. But I really don't know what the proposition was.

235 Q. They have never made any change, however?

A. No sir.

SIMON N. JONES, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?

A. Simon N. Jones.

Q. Where is your place of business?

A. Second and Main.

Q. What is your business?

A. The drug business.

Q. What kind of a telephone have you?

A. Pay station.

Q. Is that a Cumberland?

A. Yes sir.

Q. What is the number?

A. Main 698.

Q. How long have you had a pay station?

A. We have had two kinds of pay stations. At first we had a pay station that we gave them $3.50 net a month for, $4.00 a month, less fifty cents discount, and we got half of what went into the box. About four months ago they put in another station and now we have to guarantee $4.00, and are entitled to all the earnings of the box up to $4.00, and over that, one half.

Q. Under the old arrangement what part of the proceeds did you get that you received on an average?

A. $1.00 and $1.25 a month was my part.

Q. You paid $3.50 a month anyway?

A. Yes sir; $4.00 less fifty cents, $3.50 net.

Q. Did you have a written contract?

A. I don't think I did. I am not positive about that, but I don't suppose I had.

236 Q. You guarantee $4.00 a month now?

A. Yes sir.

Q. What is your proportion of the proceeds?

A. I think last month—I have to pay all of the $4.00; if it takes in $1.00 I have to put in $2.50; if it pays $4.00, it costs me nothing.

Q. If it takes in $4.50 what do you get?

A. I get one half of the fifty cents.

Q. How are you doing now?

A. We take in $1.00 or $1.50.

Q. It nets you $2.00 or $2.50?

A. Yes sir.

JOSEPH GATHRIGHT, called for the defendant, being duly sworn and examined by Mr. Quin, deposed as follows:

Q. What is your name?
A. Joseph Gathright.
Q. What is your connection with Harbison-Gathright & Company?
A. Treasurer.
Q. Has that company a Cumberland telephone in their business office?
A. Yes sir.
Q. What kind of a phone—is that a straight or a party line?
A. A trunk line with five stations.
Q. What is the number of that phone?
A. 414 Main.
Q. What do you pay for that phone?
A. It nets us $27.50 a month.
Q. Is that for the trunk line?
A. The five stations.
Q. How much do you pay for the trunk line?
A. Eight dollars.
237 Q. How much for each station?
A. Each station is $1.50 a — gross.
Q. You get a discount of how much a month?
A. Three dollars a month.
Q. That is, fifty cents on the trunk line and fifty cents on the stations?
A. Yes sir.
Q. On all the stations, fifty cents?
A. Fifty cents on each station.
Q. How many stations have you?
A. Five.
Q. Have you a written contract with the company?
A. We had a written contract which was made November 28th, 1905, for three years, but we have been running along since then without any contract.

G. ERNST, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?
A. G. Ernst.
Q. Where do you live?
A. Twelfth and Kentucky.
Q. Have you a Cumberland telephone?
A. Yes sir, I had one. I have not got it any more.
Q. What kind of a phone was it?
A. Pay station.
Q. What did it cost you?
A. It was about a year ago that I had it put in and I told the man to put the phone in and I would take the phone for three months, and he told me I would have to get in $4.00, and whatever was in there I would take it, and I would have to be good for $4.00, and if

there was not $4.00 I would have to make it up. I said All right,
and he said to sign the paper, and I signed the paper. I never
238 heard no further, and after three months I told him I didn't
want the phone no more. I said it didn't do me no good, and I can't get service out of it, and nobody else. You would call them and sometimes you would get them and sometimes you wouldn't, and I said I have just used it once and I paid a nickel, and then I paid $10.00. That man came around and collected from me and I told him that, and he said we had to call them up by the phone. We called them up, myself, my wife and another person called them up, and told them we did not want the phone no more, to come and take it out. He said nobody would come to the station. They said Yes over the phone, and that is all, and they never took it out and left it in there for six months, and when, about three months past, some one came around and said he was from the Cumberland Telephone and had come from the company to see me, and he took what money was in there and never said anything else.

Q. How long did you pay $4.00 a month?

A. Three months.

Q. That is all you paid?

A. Yes sir; I told them to take it out.

Q. Was that in your residence or store?

A. In the store.

Q. Did you get any part of the proceeds of the money in the box?

A. No sir, never a cent out of the box.

Q. What was the number of the phone?

A. The phone was 1680 South.

Q. South?

A. Yes sir, South. So six months past the man came around and said he had been sent from the Cumberland Telephone Company and he opened the box and took out only $1.00 and he said I owed him $21.00 and something, $21.05 or something, and I told him I didn't owe him a cent because I never had any use for the phone and told him that I told them to take it out, and they hadn't taken it out, and I said If you keep it in there any longer you will just have to pay me rent. I don't want it any more, so it stood there and I think
in the next two or three days they came and took it out. Then
239 a man came around and wanted to collect the money, and
then another man came around and wanted to collect the money, and I told him I could not pay him, that I had no service for it and I could not pay more than my honest debts now, and it is in court now, in 'Squire George Dailey's court. It is set for the 9th of July. It was to come off twice already, and the first time I was there and the second time when the case came on I was sick.

Q. That is for the balance?

A. Yes sir.

Q. You had no written contract with the company?

A. Yes sir.

Q. After the three months?

A. That is what I have witnesses for, that he never said anything

more than three months. They want to make me pay for a year; nobody spoke a word about a year at all.

Cross-examined by Mr. FAIRLEIGH:

Q. They actually sued you for the balance?

A. Yes sir; and on the 9th of this month it is coming off again. It has been ready to come off twice, and the first time I was there and had witnesses, and they put it off again, and on the second time it came up I was sick and I could not make it, and now it is to come off again.

Q. You were sick and unable to attend court?

A. I was under a doctor. The doctor said it was next to typhoid fever and I was in bed. And that I could not leave the bed, and they put it off for a month and gave me time to get well.

Q. Where do you live?

A. Twelfth and Kentucky.

Q. What is your business?

A. Grocery, bakery and butcher shop.

Q. Good business?

A. Pretty good business; I have three hands working for me always.

240 Q. Is there anything else you want to say?

A. No sir, that is all I know. I couldn't say no more. I think it was wrong because the people wanted to get it out of me more than I ought to pay. All I can do is, to pay my honest debts and they just try to skin it out of me.

GEORGE C. STAUBER, called for the defendant, being duly sworn and examined by Mr. QUIN, deposed as follows:

Q. What is your name?

A. George C. Stauber.

Q. Do you live at Nineteenth and Broadway?

A. Yes, sir.

Q. Have you a Cumberland phone?

A. Yes, sir.

Q. What is your number?

A. West 450.

Q. Straight line or party line?

A. Straight line.

Q. Have you a business phone or a residence phone?

A. Business.

Q. What kind of a phone, pay station?

A. Yes, sir.

Q. How much do you pay a month for that?

A. Nothing.

Q. Do you guarantee anything at all?

A. No, sir; they guarantee me ten per cent. for all that is taken out.

Q. It don't cost you anything?

A. Except when I want to use it I pay a nickel as well as anybody else.

Q. What does that amount to?
A. $4.00 or $5.00 or $6.00 a month.
241 Q. Average you that much?
A. No sir, I get ten per cent. of that.
Q. It will average $5.00 a month?
A. Pretty near $5.00 a month, and if it is $5.00 I get fifty cents, ten per cent. of it.
Q. Have you a contract with the company?
A. No sir.

Cross-examined by Mr. FAIRLEIGH:

Q. You just have a straight pay station with no privileges?
A. No sir; I pay the same as anybody else.
Q. And ten per cent. is in the nature of rent for putting up the station in your place?
A. Yes, sir.

Re-examined by Mr. Quin:

Q. Are the incoming calls free to you?
A. Yes, sir; they are free to me if anybody calls me up.

The further taking of these depositions *were* adjourned until 9 o'clock, July 8th, 1909.

242 Honorable JAMES F. GRINSTEAD, called for the defendant, being duly sworn and examined by Mr. Blakey, deposed as follows:

Q. Where do you reside?
A. I reside in Louisville; 1151 Second Street.
Q. Are you Mayor of the City of Louisville at present?
A. Yes, sir.
Q. Were you elected Mayor by the people of Louisville?
A. Yes, sir.
Q. How long have you been Mayor?
A. About 23 months.
Q. Mr. James E. Caldwell, the President of the complainant company, has given a deposition in this case, in which he states that at a conference at your office between himself and Mr. Granbery, and possibly others, with you also present, that the telephone situation in Louisville was discussed, and that you stated at that conference that you had no complaint to make against the Cumberland Company, or, rather, that there wasn't any complaint upon your part, except of the fact that there were two telephone companies in the city of Louisville—is that statement correct?
A. Well, Mr. Caldwell and Mr. Granbery and Mr. Fairleigh and others were in my office and there was talk about the telephones. Just what occurred there, or what was said there, I would not undertake to say, because it has been some time. I don't know that I am clear as to what was said, except as far as I am concerned, I know I did not have much to say.

Q. Did you say at that conference that the proper way to get rid of competition and telephone rates was to repeal the Cumberland Telephone's franchise and allow the Home Telephone to go into bankruptcy and sale?

A. I never said that.

Q. Did you say at that conference that out of the wreck and ruin that would be created by repealing the franchise of the Cumberland Telephone Company to do business at Louisville, and the bankruptcy of the Home Telephone Company, that a new com-
243 pany would be created to do telephone business in Louisville?

A. I have no recollection of advancing any such idea as that. It was not in my mind, is not in my mind, and never was that I know of.

Q. Mr. Caldwell uses the following language in his deposition in this case, after he had stated that you had said the things I have just been asking you about:

"In other words, it was plain that the proposition was to wreck the two concerns, they to wreck one and the other would ruin itself, and out of that wreck and ruin would come a new institution." Did you make any such statement at that conference, or any time?

A. I did not make any such statement as that. I had no idea of ever wrecking anything, or anybody, or any company.

Cross-examined by Mr. GRANBERY:

Q. The conference at your office that you have spoken of was in the forenoon of the day when the Revision Committee of your City Council was to meet and hear argument for and against the then pending ordinance, styled, "An Ordinance to create a comprehensive telephone ordinance." Do you recall that?

A. The conference?

Q. Yes?

A. I remember you gentlemen visited me—yes, sir.

Q. Don't you recall it was in the forenoon of the day?

A. I do not recall that it was in the forenoon of any particular day, but it was in the forenoon. I know, if you would allow me, that it was about the time that that meeting—that public meeting was held here for the discussion, but I do not remember whether it was before or after.

Q. To refresh your recollection, upon thinking it over, don't you recall that Mr. Caldwell and Mr. Granbery stated that they had come from Nashville to appear before the Revision Committee that was to have an open meeting that afternoon to discuss this comprehensive telephone ordinance that was then pending?

244 A. Well, I could not say whether you told me that you had come or that you had been. As I say, I do not know whether it was the day after or the day before.

Q. Did not Mr. Caldwell explain to you that the only objection he had to that ordinance was, that it undertook to repeal the right of the Cumberland Telephone Company to do business in Louisville?

A. Well, I don't know that I could say that I do have that recol-

lection about it. I know that Mr. Caldwell expressed himself about it as not being especially interested in the ordinance.

Q. Now, was it not stated in that conference that the Home Telephone people claimed that they could not exist on their present rate, and that if the Cumberland Company's franchise was repealed and this new ordinance passed, that, in that way, the people of Louisville would have but one telephone company?

A. Well, now I could not say whether that was stated or not. I say that I haven't a very distinct recollection of what did occur there. I know the thing was discussed pro and con, but just what was said, I don't believe I can state exactly. Mr. Caldwell and you yourself, you know, done most of the talking.

Q. The shoe was pinching us a good deal more than it was you?

A. Certainly.

Q. Now, Judge Richards, I believe at that time, was the City Attorney, or, rather, he was representing the Mayor at the Revision Committee's open meeting, was he not?

A. Judge Richards, at that time, was not City Attorney, and just who he was representing in that meeting I would not undertake to say.

Q. Judge Richards was the retiring City Attorney, was he not?

A. Yes, sir.

Q. And Mr. Blakey, the present City Attorney, had just been appointed that day or the day before, isn't that so?

A. Mr. Blakey was appointed on the 15th of December.

Q. This ordinance, which is attached to your answer in this case, had been drawn by Judge Richards while he was City Attor-
245 ney, was it not?

A. What ordinance is that?

Q. That is the comprehensive telephone ordinance.

A. Yes sir, that is my understanding, that he drew it.

Q. I understand that is a fact. Of course, Judge Richards would have a better idea at that time of what the purpose of that ordinance was than you would at the present, I assume.

A. Well, I expect your assumption is correct on that.

Q. Now, what was your purpose in having introduced and passed an ordinance repealing the Cumberland Company's franchise or right to do business in Louisville?

A. Well, I thought that the Cumberland Telephone Company was not treating our people right, they were charging too high rate and they were discriminating.

Q. From what source had you gotten that information?

A. Well, partly from my own knowledge and partly from hearsay.

Q. Now did not David W. Fairleigh, the local counsel for the Cumberland Company in Louisville, come to you more than once and insist that you have the company's books and accounts examined and see whether their charges were too high or not?

A. I don't know that he did.

Q. You know David W. Fairleigh?

A. Very well.

Q. He is a gentleman of high standing in the community?

A. He is a splendid gentleman.

Q. And if he would make the statement that he had been to you repeatedly to get you to examine the books of the company and accounts to see whether their charges were excessive or not, prior to the introduction of this ordinance, you would accept that, would you not, as being true?

A. Yes, sir.

Q. You do not recall whether he did or not?

A. I don't remember that he ever did.

Q. Do you recall that while Judge Richards was City Attorney that he told you that the company had insisted upon the
246 City examining its books to see what profit it was making, and did you not discuss with Judge Richards the method by which you could have that done, that is, examine the company's books to ascertain what they were doing in the City of Louisville?

A. I don't remember that I ever discussed that with him until after—with him or anybody else on that line until after this suit was begun.

Q. When this comprehensive franchise was defeated—I believe it was defeated at your instance, was it not?

A. Yes, sir.

Q. After that was defeated, you then had introduced this repealing franchise which is now in this suit—this repealing ordinance which is now involved in this suit, is that correct?

A. Yes, sir.

Q. Did you notify the company or any of its officials that you intended to introduce that ordinance and have it passed?

A. I don't know that I did.

Q. Did you state to them why you intended to have it passed?

A. I don't think I ever did.

Q. Did you give any reasons to the Council, publicly by message or by speech, as to why they ought to pass that ordinance?

A. Yes, sir.

Q. What was that, if you recall the substance of it?

A. I have already answered that in another answer that I gave, that I thought that the Company's rates were too high, and that they were discriminating against our people, many of our people, rather.

Q. Did you discuss that matter with any of the officials of the Company prior to the introduction and passage of this repeal ordinance?

A. No sir; the only discussion that ever I had with any of the officers of the Company was the one that you referred to in the outstart, when Mr. Caldwell was in my office.

Q. Did you state to the officials of the Company in that one interview you had with them that you objected to the discrimina-
247 tions that the Company was practicing?

A. Did I?

Q. Yes.

A. Well, I could not say that I did. As I said a while ago to

you, I can't recall all that was said in that conference, except that I said very little and listened to Mr. Caldwell. You know, he had a good deal to say.

Q. Now, so far as you know, did the Company's officials have any intimation of the fact that you objected, or had any grievance against the Company, because of discrimination in the City of Louisville?

A. I do not believe I could answer that. I have no recollection of it, however. I do not know that they did. They may have had.

Q. Now you say that you had a belief that the Company was charging excessive rates. What did you do to ascertain whether or not that fact was true?

A. I don't know that I could say what I did. I never examined the books of the Company.

Q. Did you give the Company or its officials any opportunity to satisfy you that you were mistaken in your belief that the Company's rates were excessive?

A. No sir, I don't know that I did.

Q. Now there had been a great deal of agitation about telephone rates in Louisville for two or three years, hadn't there?

A. I have heard that there was.

Q. Now, let me see if I cannot recall to your mind these facts: There was a rate ordinance introduced fixing $4.00 as a maximum rate, and that was enjoined and was pending in court when you became Mayor.

A. Yes sir; that is what I have understood was the case.

Q. Now then, just before you came in as Mayor the Council undertook to pass an ordinance allowing maximum rates $7.50 a month, and that ordinance you undertook to veto just after you came in, and the question arose in the court as to whether
248 or not you had vetoed it within the time authorized by law—that is correct, is it not?

(The last question was read to the witness by the stenographer.)

A. No sir, that is not correct.

Q. What are the facts in regard to that?

A. There was no such ordinance introduced or pending when I came into office, or after I got into office.

Q. I see that I was mistaken. Wasn't this the fact: Soon after you became Mayor, an ordinance was introduced and passed to sell a telephone franchise carrying maximum rates of $7.00, and you vetoed it, and then the question arose in the court as to whether you had vetoed it in time, and pending that controversy in the courts the Council repealed that ordinance. Are those the facts?

A. Yes, sir.

Q. Then your comprehensive telephone franchise was next introduced and passed the Lower Board, and was pending in the Upper Board when the conference between the telephone officials and yourself took place in your office, and later that was defeated in the Upper Board?

A. I do not know in what order these ordinances were introduced.

I did veto the ordinance fixing the rate of $7.00 and a franchise to be offered for sale, but whether that was before or after the ordinance known as the Ordinance creating comprehensive telephone system was out of the way or not, I cannot say. The ordinance was defeated in the Board of Aldermen.

Q. Well, at any rate, the last thing that has been done was the passage of the ordinance repealing the Cumberland Telephone Company's right to do business in Louisville, and immediately following that, the ordinance fixing the rate of $5.50 maximum charges, that is true, is it not?

A. Now, about its being the last thing that was done, I could not say, but such ordinances were passed.

Q. You do not recall any that has been introduced or passed since then, do you?

A. Relative to the——

249 Q. To the telephone situation.

A. No, I don't think I do. It seems to me, however, that after those two ordinances were passed, the Council repealed the ordinances I vetoed.

Q. Now, Mr. Grinstead, you did not sign or swear to the answer in this case, did you?

A. Well, I could not say whether I did or not. I presume, as Mr. Granbery says, that I did not, that that is the case.

Q. Do you recall seeing the answer in this case before it was filed?

A. I could not say; I presume that I did, though.

Q. That answer contains a statement that notice was given to the Company and just cause assigned for the repeal of the franchise before it was repealed. Now I assume from that, not seeing your name at the end of the answer, that you had never read the answer before it was filed. Do you recall any such statement as that?

A. I am sure that I never read the answer through. I am satisfied of that.

Q. Now, that answer also contains a statement that the Company was dictatorial, offensive and oppressive. Did you sanction that statement in the answer?

A. Well, that the Company usually dictated its own terms is a fact; that it was offensive, I do not know that I could say that. I would not like to say that the Company was offensive, except that the present President was quite offensive in my office, as you very well know.

Q. In what respect was he offensive?

A. The language that he used there.

Q. In what way? I do not recall that Mr. Caldwell said anything that was offensive.

A. He addressed his remarks especially to me personally, quite offensive.

Q. He was simply vehement in his manner in protesting against his property right being destroyed here, wasn't he?

250 A. Yes sir; and a little further than that, too.

Q. What did he say that was offensive?

A. I do not undertake to say. I believe that that is hardly necessary right here anyhow, a personal matter.

Q. Well, he did not call you—he didn't say anything that was personally offensive to you individually, did he?

A. Oh, yes sir; for instance, he said fellows like you were trying to do this, that and the other.

Q. Now, you say that the Company always dictated its terms. You have been in the wholesale grocery business, have you not?

A. Yes, sir.

Q. You were never able to dictate terms to your patrons, were you?

A. Usually did it.

Q. Doesn't it take two to make a trade?

A. Yes, sir.

Q. And if the telephone company could not get people to patronize them at their rates, they would have to come to the patrons' rates, wouldn't they?

A. I never heard of it.

Q. What?

A. They never come to mine and the proposition that I made them.

Q. Did you ever try to get the rates reduced other than by passing a rate ordinance?

A. You alluded to my being in the grocery business. Yes sir, I tried to get my rates reduced when I was in the grocery business.

Q. How much did you want them reduced?

A. I did not want them raised from six dollars up to eight. I wanted them reduced after they had been raised to eight.

Q. Who did you see about that?

A. Your agent; the gentleman I made the contract with.

Q. Did you confer with any of the officials of the Company?

A. No, sir.

251 Q. Did you write them, or let them know that you were dissatisfied in any way?

A. No sir.

By Mr. BLAKEY: You were asked on what you based your opinion that the Company was charging exorbitant rates. I'll ask you if, prior to the passage of the ordinance fixing the rate of the Cumberland Telephone Company at a maximum of $5.50, you caused an examination to be made of the books of the Home Telephone Company by the City's Accountant, and whether you had a report of the expenses and earnings of the Home Telephone Company at the time the repeal ordinance in this case was passed.

A. Yes sir; I had had an investigation made of the Home Telephone Company's books.

Q. And did you have such a report at that time?

A. Yes, sir.

Q. What did that report show to be, in a general way, the net profits of the Home Telephone Company, after paying its expenses, if you remember?

A. That report showed that in the year 1907 the earnings of the Home Telephone Company, who had about nearly 9,000 subscribers,

after paying its expenses of maintenance, etc., as they had decided, and paying interest on Eighteen Hundred Thousand Dollars in bonds at the rate of five per cent per annum, was $97,000.00.

Q. And what were the rates of the Home Telephone Company at that time?

A. For a business telephone, $4.00.

Q. What for residence?

A. I think two dollars was the rate.

Q. Was four dollars the maximum rate?

A. Let's see if I cannot give them to you exactly: I may have them in my pocket here; no. I left them on my desk.

Q. Was four dollars the maximum rate charged?

A. Yes sir, that is for business telephones, and in the first four months of 1908 it paid its operating expenses, maintenance, interest on its bonds five per cent per annum, and made a net gain
252 of about forty-three thousand dollars and something, showing that over and above its expenses, and interest on its bonds of five per cent, that it had netted about nine per cent in those four months—at the rate of nine per cent per annum in those four months.

Q. Did you, at the time you recommended the passage of this repeal ordinance, have before you any statements, annual statements, of the Cumberland Telephone & Telegraph Company, showing the extent of its earnings?

A. Yes, sir.

By Mr. GRANBERY: And you really believed that the Home Telephone Company had made, net, $180,000.00 a year in Louisville.

A. How much?

Q. One hundred and eighty thousand dollars a year.

A. I didn't say that.

Q. You said that they had paid five per cent interest on a million, eight hundred dollars of bonds, which is ninety-five dollars in money, and they made ninety thousand dollars on top of that.

A. Ninety-seven thousand dollars on top of that. That is what that book showed.

Q. And you really believed that they made that much money?

A. Bound to believe it, the books show it.

Q. What territory does the Cumberland cover? You say you had annual reports to its stockholders, I presume you mean.

A. What territory does it cover?

Q. Yes.

A. I could not undertake to answer that. I don't know.

Q. Do you know how many exchanges, how many toll lines, are included in that report?

A. No sir.

Q. Did that give you any indication whatever as to what the financial results were from the operation of the Louisville Exchange?

A. That general statement of the Cumberland Telephone Company?

Q. Yes.

A. I don't remember now that it did. I don't know. I
253 would not say.

Q. Now, having examined the books, or caused the books of the Home Company to be examined, why didn't you have the Cumberland Company's books examined before undertaking absolutely to destroy its right to exist in Louisville?

A. It seems to me that that had been proposed and declined, but I am not positive about it.

Q. How was it proposed, and who declined it?

A. I could not say. I am going on—it seems to me that that was what Judge Richards reported to me, but I would not say positively that such was the case.

Q. Didn't Judge Richards report to you that he could not possibly sustain the rate—the maximum rate of $4.00 in the ordinance which had been passed before you became Mayor, and which was then involved in litigation at the time you became Mayor?

A. No, sir; I think not.

Q. As a matter of fact, that suit was dismissed by the City, was it not?

A. I believe it was dismissed by the City. That is my recollection.

Q. On the ground that the rates were confiscatory, isn't that correct?

A. No sir, I don't know whether it was. I don't know what was the ground. I was not the attorney and could not tell.

254 H. B. WARREN, called for the defendant, being duly sworn and examined by Mr. BLAKEY, deposed as follows:

Q. Where do you live?

A. At Louisville?

Q. What is your business?

A. I am employed by the Mutual Audit Company as an auditor and accountant.

Q. Mr. Smith, the Auditor of the Cumberland Telephone Company, has filed with his deposition in the case of the Cumberland Telephone Company against the City of Louisville, pending before the Special Master at Louisville, Kentucky, which is a separate case from this case, an exhibit which he names Exhibit No. 6, and which he says contains the names of all of the subscribers to the telephone exchange of the Cumberland Company at Louisville, Ky. Have you seen and examined that exhibit?

A. I have.

Q. Have you examined the names in that book and the rates charged to the various subscribers as they appear in that exhibit?

A. I have.

Q. And does that exhibit show any discrimination among the subscribers of the same class?

A. It does.

Q. Please indicate to the stenographer some of the names of subscribers appearing in that exhibit as being of a particular class of

subscribers, and indicate what rates are charged the subscribers whose names you indicate.

A. Would you like to have them all as they appear, or just some of them?

Q. Just some of them.

A. Under the classification Business Direct, for which the regular charge—the regular monthly charge, regular monthly rental charge of the Cumberland Telephone Company is eight dollars, there appear variations in the monthly rental charge, some of which are as follows:

255 The Board of Children's Guardians pays $2.50 per month; Board of Church Extensions M. E. Church, $2.50; Board of Park Commissioners, $6.50; Board of Trade, two phones, one at $6.50 a month, one phone free; Business Woman's Club, $2.50 a month; Calvary Church, $2.50; Cemetery Adath Israel, $4.00 per month; Christ Church Cathedrdal, $2.50; Commercial Club, no charge; Commissioners of Storage have seven telephones at a monthly charge of $4.00 each; County Sheriff's office, County Circuit Clerk $4.00 a month each; County Common Pleas Court, no charge; County Health Office, County Jail, County Fiscal Court and the County Judge, Coroner and County Coroner each a telephone at $4.00 per month; First Christian Church, $2.50; First Church of Scientists, $2.50; First Regiment Armory, no charge; H. B. Grant, $2.50; Thomas R. Gordon, $1.50; Home of the Friendless, $2.50; Hope Rescue Mission, no charge; Iroquois Park, $6.50; Juvenile Court, no charge; Kentucky Humane Society, $2.50; Kentucky Institute for the Blind, $7.00; Kentucky National Guard Armory, no charge; Public Library, two phones at $2.50 each; one phone at $4.00; Louisville Law Library, $3.00; C. C. McChord, no charge; Newsboys' Home, no charge; Joseph Pryor, $4.00; Robinson Bros. and Wilson, $4.00; St. Xavier's Laundry, $2.50; Tavern Club, $5.00; Young Men's Hebrew Association, $2.50.

Q. Do all those names appear under the classification in that exhibit as Business Direct Telephones?

A. They do.

Q. About how many names appear on that exhibit of Mr. Smith's as Business Direct Telephones?

A. Between 950 and 1,000.

Q. What do the majority of them—what rate is charged for the majority of those phones as appears on that exhibit?

A. I think that the regular monthly rate, rental rate for business direct phones is $8.00 per month, with a discount of fifty cents per month,—for prepayment, which would make a net rate of $7.50 per month.

Q. Are the majority of those 950 subscribers, as they appear on those books, charged with $8.00 or net $7.50?

256 A. They are.

Q. Now take the residence direct, as appears on Mr. Smith's Exhibit No. 6 in that case, and indicate what rates are charged for that class of service.

A. Under the classification Residence Direct, Rev. E. S. Alder-

man, $4.00; J. J. Anderson, free: John W. Barr, Jr., free; W. K. Boardman, $3.00; Boyle G. Boyle, free; Seigel Bronner, free; Robert W. Brown, free; Reverend W. R. Brown, $2.50; Reverend Charles E. Craik, $2.50; Reverend Jas. T. Cronin, two phones, $2.50; Elks Home, $2.50; J. T. Featherston, free; H. N. Gifford, free; Charles F. Grainger, free; O. D. Green, free; Reverend J. W. Graybill, $2.50; George J. Hall, free; Reverend Chas. R. Hemphill, $2.50; Jno. C. Hughes, $3.50; Reverend Francis W. Irwin, $2.50; Reverend M. C. Kurfees, $2.50; Reverend W. W. Landrum, $4.00; B. Leibert, $3.00; Reverend A. B. Lipscomb, $2.50; Reverend Jno. K. Mason, $4.00; H. J. McCutcheon, free; G. F. Mockridge, $3.00; A. W. Metzger, free; Reverend J. G. Minnegerode, $2.50; Miss Carrie Minton, free; Reverend Jno. Mockridge, $4.00; Reverend H. F. Mason, $2.50; Reverend G. W. Nutter, $2.50; Reverend R. T. Nooe, $4.00; Reverend H. A. Porter, $4.00; Reverend Charles P. Raffo, $2.50; Henry Schuhman, free; Charles Smith, free; Reverend D. W. Smith, $2.50; J. B. Speed, free; J. E. Stone, free; Frank P. Straus, free; Reverend Henry S. Sweets, $2.50; F. J. Waltz, free; Rev. G. C. Waller, $2.50; Reverend Aquilla Webb, $4.00; Reverend C. F. Wimberly, $2.50; Charles E. Woodcock, $4.00; Young Women's Boarding Home, $2.50.

Q. Do you know what rate the Cumberland Telephone charges generally for residence direct telephones, in Louisville?

A. I believe it is $4.00 gross, $3.50 net, per month, if paid three months in advance.

Q. About how many subscribers of the Cumberland Telephone Company in Louisville who are classified as users of residence direct telephones?

A. There are over nine hundred.

Q. What rate is the majority of those users charged?

257 A. Four dollars gross, three fifty net.

Q. Now, taking up the pay stations that appear in that exhibit, about how many pay stations does that exhibit show the Company has in use in Louisville?

A. Over fourteen hundred.

Q. And what rates are charged the various subscribers for the use of those pay stations?

A. For business pay stations, there are two rates, one rate at $4.00 per month guaranteed by the subscriber; another rate on which there is no guaranty of any amount, that the subscriber receives as commission ten per cent. of all money in the coin collection box for local city messages only. Of the residence pay stations, there are two rates, one at the rate of $1.00 per month guaranteed for the subscriber, and the other class, or the other lot under which there is no guaranty from the subscriber and no commission paid to the subscriber. The total contents or the total receipts of the coin collection box being the property of the telephone company.

Q. Now, the private branch exchange: Are there any of those that appear in that Exhibit No. 6 of Mr. Smith's?

A. There are.

Q. Will you please indicate the names of the subscribers, and the rates charged as to some of those?

A. I will give you the name of the subscriber and the equipment that is necessary to furnish the private branch exchange, and the rate paid for it:

Ahrens & Ott, two trunks, $6.50 a month each; switchboard free; eleven stations, eighty-three and a third cents each, net prices.

B. F. Avery & Sons, one trunk at $7.00 per month; one trunk at $8.00 per month; eleven stations at $1.50 a month each, gross prices.

Belknap Hardware Company, three trunks at $6.00 each; one trunk at $7.00; one at $8.00; fifty-eight stations at $1.50 each; gross prices.

258 C. C. C. & St. L. Railroad, four trunks, free; two trunks at $13.00 per month; switchboard free; seventeen stations at eighty-three and one third cents per month; net prices.

Courier-Journal and Times, two trunks at $6.00, one at $7.00, one at $8.00; fourteen stations at $1.50 a month; the two six dollar trunks net prices, and the balance gross prices.

Galt House, one trunk at $8.00; three at $6.25, two switchboards free; 229 stations at fifty cents a month; two lists and an extension bell, all net prices.

Kentucky Distillers' Warehouse Company: two trunks at $11.50 each; a switchboard at $5.50; ten stations at $1.50; gross prices.

Louisville Lighting Company: two residence direct telephones, $3.50 a month; five trunks at $12.50; one switchboard at $10.50; 19 stations at $1.50; one at $6.15; one at $6.00; two at $6.64; two at $7.25; one at $7.88; one at $10.38; all gross prices.

Louisville Hotel: Six trunks free; switchboard free; three stations free; 158 stations at sixteen and two thirds cents a month, net; and eight pay stations free.

Louisville Trust Company Seven trunks at $6.50; one trunk, $9.75; nineteen lists, $13.75 each; fifty-four pay stations at eighty-three and one third cents a month; all net prices.

Q. That is enough of them. Did you make any examination of the books of the Cumberland Telephone Company, and did you ascertain whether Exhibit No. 6, as filed by Mr. Smith in the deposition I have referred to, correctly shows the names of the subscribers to the Cumberland Company's exchange at Louisville as of the first day of April, 1909?

A. I made an examination of the Cumberland Telephone Company's books pertaining to the Louisville Exchange and I examined Exhibit No. 6, as filed by Mr. Smith. *I* course, I am unable to state from my own knowledge as to whether that exhibit contained the name of every subscriber at the Louisville Exchange.

Q. From what source did you get that Exhibit No. 6 in that case to examine?

259 A. You mean where did I get the exhibit in the first place?

Q. Yes.

A. It was handed to me by the attorney for the defense for examination.

Q. During the time you were examining the books of the Company, did you make any investigation to ascertain any facts in regard to the subscribers or telephone company at Louisville?

A. As to the number, yes sir; and classifications, yes. We were furnished by the Auditor of the Cumberland Telephone Company with a list of those subscribers. Well, I do not know that I ought to say that. Mr. Wilkinson, who made a joint examination with us, was furnished with such a list, and Mr. Wilkinson loaned us this list for our inspection. This list was furnished to Mr. Wilkinson by the Auditor of the Cumberland Telephone Company.

Q. Have you made a calculation, based on Exhibit No. 6, filed by Mr. Smith with his deposition in the other case, to ascertain what the Company would earn if — charged the rates fixed in the ordinance which is being questioned in that suit, the maximum rate being $4.50 as fixed in that order? Have you made a calculation to determine what amount the Company would earn if it charged all of its subscribers in the same class the rate fixed in that ordinance, as based on that Exhibit No. 6 of Mr. Smith's?

A. I have.

Q. And about what would be the receipts if the rate ordinance was put in force and all subscribers charged on the basis at the rate ordinance?

A. To the best of my recollection, the total gross receipts will be $324,151.90.

Q. And on what number of telephones?

A. 9,296 instruments, telephone instruments.

Q. And about how many—about what was the average of the telephone- which the Company had in force in Louisville during the year 1908, as shown by the books of the Company? Was it over 10,000?

A. The average was not over 10,000. It was something
260 like 94 or 9500, to the best of my recollection.

Q. And what did the books of the Company show were the receipts from those telephones for that year?

A. Do you want the receipts now from the telephones only, or the Louisville Exchange earnings, there being some fourteen or fifteen hundred dollars earnings outside of telephone rates?

Q. Louisville Exchange earnings.

A. $314,275.52.

Q. And what was the maximum rate in force in Louisville during the year 1908?

A. Eight dollars gross, seven dollars and fifty cents net.

Cross-examined by Mr. GRANBERY:

Q. Have you ever had any experience in the telephone business?

A. No sir.

Q. Do you know the reason, or why, there exists a difference in the rate of concerns named by you in your direct examination?

A. Do I know it? No, I do not know it.

Q. Do you know whether any of the parties named by you are employés of the Company?

A. There were some there, yes sir.

Q. Now, the most of the names given by you were either charitable or religious or public organizations, were they not?

A. Yes, sir.

Q. Some of them were officers of the Telephone Company in the City of Louisville?

A. Yes sir.

Q. And its employés?

A. Yes sir.

Q. And some of them was the Park Commission and the sewer department of the city, and other departments of the city?

A. Generally, yes sir. I do not recall any city employés, but that is the general trend.

Q. You do not undertake to say, do you, that that is a dis-
261 crimination? You simply state that there is a difference in rates?

A. That is all I say.

And on December 8th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, Defendant.

This day came the complainant by Fairleigh, Straus & Fairleigh, its counsel; came also the defendant by Clayton Blakey, W. O. Harris and Huston Quin, its counsel. The Court being now sufficiently advised of the exceptions of the defendant to certain parts of the deposition of James E. Caldwell, taken on behalf of the complainant herein, it is considered and adjudged by the Court that said exceptions be, and they are, hereby sustained.

262 And on the same day of said term of said court, to-wit, on December 8th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF LOUISVILLE, KENTUCKY, Defendant.

Decree.

This cause having been heretofore heard and submitted for final judgment and decree upon the whole record, and the Court being now sufficiently advised, delivered an opinion in writing, which is ordered to be filed; and, pursuant thereto, it is now ordered, adjudged and decreed as follows:

1. That the Act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to incorporate The Ohio Valley Telephone Company," approved April 3, 1886, granted to The Ohio Valley Telephone Company the right and franchise to construct,

equip and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes, to lay pipes, cables, conductors and wires; and to operate its telephone lines over, along or under any highway, street or alley of the City of Louisville, upon condition that the consent of the City of Louisville should be first given thereto; that the ordinance of the General Council of the City of Louisville, approved August 17, 1886, gave the consent of the City of Louisville to the grant of said franchise by the General Assembly of the Commonwealth; that the said ordinance was duly and seasonably accepted, and all its terms and conditions complied with by The Ohio Valley Telephone Company, and that said Act of the General Assembly of the Commonwealth of Kentucky, the consent there-
263 to of the City of Louisville, the acceptance of said ordinance by The Ohio Valley Telephone Company of all the terms and conditions of said ordinance, created and constituted a contract between the parties and the State and City, which contract and all property right acquired thereunder passed to the complainant, the Cumberland Telephone & Telegraph Company, upon the consolidation of the former corporation, named the Cumberland Telephone & Telegraph Company, with the Ohio Valley Telephone Company, and all rights under said contract of the last named company passed to complainant, and which property rights are now owned by the complainant, the Cumberland Telephone & Telegraph Company.

That the General Council of the defendant, City of Louisville, had and has no power to repeal, or in any other way to annul or destroy the Charter of the Complainant, and none to impair the obligation of the said contract, and the ordinance of said General Council, approved January 23, 1909, which seeks to do both, was and is void and of no effect.

2. That the defendant, the City of Louisville, its officers, agents, attorneys, employees, and each of them, and all other persons, be, and they are hereby, perpetually enjoined and restrained from, in any manner, enforcing or undertaking to enforce against the complainant, the Cumberland Telephone & Telegraph Company, the provisions, or any provision, of an ordinance entitled—

"An ordinance repealing an ordinance entitled 'An ordinance confirming and ratifying Section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, approved on the 3d day of April, 1886, and entitled 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges; and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires; and to operate its telephone lines along, over and under any highway, street or alley of the City of Louisville, approved August 17, 1886,"

which was passed by the General Council of the City of Louisville, and approved by the Mayor of said city on the 23d day of January, 1909; and from in any way, under color of said ordinance, or
264 any provision thereof, interfering with the property of the said complainant; or, in any way disturbing or interfering

with any of its poles, wires, conduits or other appliances, upon, in or under the streets, alleys and highways of the City of Louisville, or in any other way interfering with or disturbing the business of the said complainant, which it is conducting in said city, and from, in any manner, interfering with the complainant's right to conduct a telephone business in said City of Louisville; and,

3. That the complainant, the Cumberland Telephone & Telegraph Company, recover of the defendant, the City of Louisville, Kentucky, its costs here in expended.

The opinion above referred to is as follows:

265 United States Circuit Court, Western District of Kentucky.

No. 7192.

CUMBERLAND TELEPHONE AND TELEGRAPH CO. Complainant,
vs.
CITY OF LOUISVILLE, Defendant.
Opinion on Final Hearing.

The Court some time since expended much time and labor in considering the demurrer to the bill of complaint, as amended, and reached the conclusion that, under the averments of the bill, the Court has jurisdiction of the case, and that the charter or law under which the complainant exists and operates was not granted or enacted by the City of Louisville, but was granted and enacted by the State of Kentucky. True, the Legislature of the State made what we may call the original going into effect of that charter, dependent upon the consent of the City of Louisville, but when that consent was given in 1886, the power of the city in the premises was executed and exhausted and the charter became effective as the law of the State. No power has ever been given to the City of Louisville to repeal or alter that law in Kentucky. Furthermore, we concluded that when the consent of the city was given, whereby the State law became effective, a contract between the State and complainant was established which the city, acting alone, could not abrogate, as was intended and attempted by the ordinance complained of. We find nothing in the answer of the defendant, nor in the large mass of testimony heard on the issues made by the pleadings, which should in any way change the views expressed in passing on the demurrer and the motion for a temporary injunction. They were set forth with possibly unnecessary elaboration in the opinion delivered on March 8th last and need not, we think, be repeated. We may, however, add that even if many reasons, or supposed reasons, exist for repealing complainant's charter or
266 grant, the mere existence of such reasons confers no power on the city of Louisville. The reasons for repeal, if any, should be presented to the State Legislature, which alone has authority to repeal the charter of a corporation. The question here

is one of power in the city, and not the existence of reasons why the proper authority should or should not exercise power. From the mere existence of reasons, or supposed reasons, which would justify repealing the charter, we cannot infer the existence of authority in the city to exercise a power which, by law, is reserved to the State alone. In short, the State has, but the city has not, the power to amend, alter, or repeal complainant's charter.

We do not doubt that the city, by enacting through its legislative body the ordinance complained of, and which, in effect, attempted to repeal the charter, intended, and thereby begun its effort to prevent, or most seriously to interfere with, the exercise by complainant of the rights conferred upon it by the State with the city's consent; nor do we doubt from the record that the city thereby begun and threatened to carry out its plan to destroy or greatly impair complainant's rights under its contract. Enforcing the ordinance would necessarily impair the obligation of complainant's contract in derogation of its constitutional rights, and would thereby inflict great and irreparable injury upon it. Hence, the remedy by injunction appears to be proper.

We find nothing in the syllabi prepared by the Supreme Court of Ohio in the, as yet, unreported case of The East Ohio Gas Co. v. The City of Akron, which, in any way, affects the questions involved here. Under the practice in Ohio, the syllabi constitute the rulings of the Court and are authoritative, while the opinion is not necessarily so. However, we find nothing in the opinion which reaches, or should control, the questions before us.

The complainant is entitled to the relief prayed in the bill, with costs, and the temporary injunction may be made perpetual. The exceptions of the defendant to certain parts of the deposition of James E. Caldwell may be sustained.

WALTER EVANS, *Judge.*

Dec. 8th, 1909.

267 And on another day of said term of said court, to wit, on Dec. 16th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
vs.
CITY OF LOUISVILLE, KENTUCKY.

This day came the defendant, the City of Louisville, Kentucky, by Clayton B. Blakey, its counsel, and filed its petition for an appeal and assignment of errors herein, and upon consideration thereof, it is considered and adjudged by the Court that an appeal be allowed said defendant to the United States Supreme Court, upon the execution of a bond in the sum of $250.00 with good and sufficient surety to be approved by the Court.

The petition for appeal and assignment of error above referred to are as follows:

In the United States Circuit Court for the Western District of Kentucky, at Louisville.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Petition for Appeal, Filed December 16th, A. D. 1909, in the Circuit Court of the United States for the Western District of Kentucky.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Kentucky:

The above named defendant feeling itself aggrieved by the decree made and entered in this cause on the 8th day of December, A. D. 1909, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeals be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, sitting at Washington, District of Columbia.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

CLAYTON B. BLAKEY,
W. O. HARRIS,
HUSTON QUIN,
Counsel for Defendant.

268 UNITED STATES OF AMERICA:

In the United States Circuit Court for the Western District of Kentucky, at Louisville.

In Equity.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Assignment of Errors.

And now, on the 16th day of December, A. D. 1909, comes the defendant by its solicitors, and says that the decree entered in the above cause on the 8th day of December, A. D., 1909, is erroneous and unjust to the defendant.

1st, Because by said decree the ordinance of the General Council of the City of Louisville, approved August 17, 1886, by and under

which ordinance The Ohio Valley Telephone Company was authorized to construct, equip and operate a telephone system in the City of Louisville and make use of the streets of said City for said purpose, was adjudged to be a valid and binding contract between the City of Louisville and the said The Ohio Valley Telephone Company, its successors and assigns, and not subject to be repealed or annulled by the General Council of the City of Louisville.

2nd, Because by and under said decree it was adjudged that the General Assembly of the State of Kentucky by an Act entitled "An Act to incorporate The Ohio Valley Telephone Company," approved April 3, 1886, granted unto The Ohio Valley Telephone Com-
269 pany the right to construct, equip and operate a telephone system in the City of Louisville by and with the consent of the General Council of the City of Louisville, and to use the public streets of said city for said purpose; and further adjudged that upon the granting of such consent by the General Council of the City of Louisville such a right or franchise became vested in The Ohio Valley Telephone Company, its successors and assigns, subject to repeal only by the General Assembly of the State of Kentucky.

3rd, Because by and under said decree it was adjudged that the ordinance enacted by the General Council of the City of Louisville, and approved January 23, 1909, repealing the ordinance of August 17, 1886, which granted unto The Ohio Valley Telephone Company the right to use the streets of the City of Louisville for the purpose of conducting a telephone business in the City of Louisville, was void and of no effect.

4th, Because by and under said decree it was adjudged that upon the consolidation of The Ohio Valley Telephone Company with the Cumberland Telephone & Telegraph Company all the rights acquired by The Ohio Valley Telephone Company under its charter, and under the said ordinance, approved August 17, 1886, passed to the Cumberland Telephone & Telegraph Company, and are now owned by and vested in the Cumberland Telephone & Telegraph Company.

5th, Because by and under said decree it was adjudged that the City of Louisville be, and it was, permanently enjoined from enforcing the provisions of said ordinance of the General Council of the City of Louisville, approved January 23, 1909.

6th, The defendant further says that in the record and proceedings aforesaid there is manifest error in this, that the Court erred in overruling the demurrer interposed by the defendant to the original complaint filed in said cause, and by upholding and deciding that the facts stated in said bill of complaint were suffi-
270 cient to constitute a cause of action, and said Court erred in rendering judgment against defendant in said cause.

Wherefore, defendant prays that the said decree be reversed, and the Circuit Court be directed to dismiss the bill.

CLAYTON B. BLAKEY,
W. O. HARRIS,
HUSTON QUIN,
Solicitors.

And on December 18th, 1909, the following proceedings were had:

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
vs.
CITY OF LOUISVILLE, KENTUCKY.

This day came the defendant by Clayton B. Blakey, its counsel, and tendered its bond, in the sum of Two Hundred and Fifty dollars with The Title Guaranty and Surety Company as surety, which is now approved by the Court and ordered filed.

The bond above referred to is as follows:

271 Circuit Court of the United States, Western District of Kentucky.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOUISVILLE, KENTUCKY, Defendant.

Know all men by these Presents.

That we, The City of Louisville, Kentucky, Principal, and The Title Guaranty and Surety Company are held and firmly bound unto Cumberland Telephone & Telegraph Company in the sum of Two Hundred and fifty dollars, to be paid to the said Cumberland Telephone & Telegraph Company, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 17th day of December, A. D. 1909.

Whereas, The above named The City of Louisville, Kentucky, hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit, by the Circuit Court of the United States for the District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named The City of Louisville, Kentucky, shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE,
By W. O. HEAD, *Mayor.* [L. S.]
THE TITLE GUARANTY AND SURETY COMPANY,
By ROBERT N. MILLER, [L. S.]
Attorney-in-Fact.

Sealed and delivered in presence of
HENRY F. CASSIN,
Deputy Clerk U. S. Courts.

Approved December 18th, 1909.

WALTER EVANS, *Judge.*

272 WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky at Louisville, do hereby certify that the foregoing 271 pages contain a true and correct copy of the record and proceedings in the cause of the Cumberland Telephone & Telegraph Company vs. City of Louisville, Kentucky, as the same appears from the files and records in my said office.

itness my hand and seal of said Court this 25th day of January, 1910.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

A. G. RONALD, *Clerk*,
By HENRY F. CASSIN,
Deputy Clerk.

273 Office of the Clerk United States Circuit and District Courts,
Western District of Kentucky, Louisville.

A. G. Ronald, Clerk.

JAN'Y 25, 1910.

Circuit Court of the United States, Western District of Kentucky.

Statement of Costs.

City of Louisville to United States of America, Dr.

To services of A. G. Ronald, Clerk, as follows:

In case of Cumberland Telephone & Telegraph Company vs. City of Louisville, Kentucky, No. 7192:	
To defendant's Clerk's costs.....	$46.15
To Clerk's costs for record for U. S. Supreme Court, 904 fol. @ 15c., seal & Cert. .35.....	135.95
.35	
To Clerk's costs for making final record, 612 fol. @ 15c..	91.80
	$273.90

274 UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To Cumberland Telephone & Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the City of Washington, D. C., on the 31st day of January, 1910, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, wherein City of Louisville, Kentucky, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said ap-

peal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of January, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America the one hundred and thirty-fourth.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

WALTER EVANS, *Judge.*

275 [Endorsed:] 7192. Cumberland Telephone & Telegraph Co. vs. City of Louisville. Citation & Copy.

Received the within Citation and one copy at Louisville Ky., Jan. 25, 1910, and executed same in Louisville, Ky., Jan. 25, 1910, on the Cumberland Telephone and Telegraph Company by delivering a true copy thereof to David W. Fairleigh member of the firm of Fairleigh, Straus and Fairleigh, attorneys, for the Cumberland Telephone and Telegraph Company.

This Jan. 25, 1910.

Fee $2.00.

G. W. LONG, *U. S. M.*,
By W. HARRY AMOS, *Deputy.*

Endorsed on cover: File No. 21,996. W. Kentucky C. C. U. S. Term No. 197. City of Louisville, Kentucky, appellant, vs. Cumberland Telephone & Telegraph Company. Filed January 31st, 1910. File No. 21,996.

2.

Office Supreme Court, U. S.
FILED.
FEB 19 1912
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1911

CITY OF LOUISVILLE, KENTUCKY,
APPELLANT,

vs. No. 197,

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
APPELLEE.

CITY OF LOUISVILLE, KENTUCKY,
APPELLANT,

vs. No. 761,

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY
APPELLEE.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

MOTION FOR ADDITIONAL TIME.

CLAYTON B. BLAKEY,
Counsel for Appellant,
ALEXANDER P. HUMPHREY,
WILLIAM L. GRANBERY,
Counsel for Appellee.

COURIER-JOURNAL JOB PRINT, LOUISVILLE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 197.

CITY OF LOUISVILLE, KENTUCKY, *Appellant*

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Appellee*

No. 761.

CITY OF LOUISVILLE, *Appellant*

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Appellee*

MOTION FOR ADDITIONAL TIME.

This day came the appellant and appellee in each of the above entitled causes and respectfully represent to the Court as follows:

One. The above causes have been ordered heard together.

Two. The first of the above causes involves the validity of a certain ordinance of the City of Louisville which re-

peals an ordinance under which the Cumberland Telephone and Telegraph Company claims its right to occupy the streets of said City with its poles and wires.

Three. The other cause involves the validity of a certain ordinance, passed by the City of Louisville regulating the rates to be charged by the Cumberland Telephone and Telegraph Company for its service.

In case No. 761 the record is very voluminous (the printed record of which is bound in two large volumes of 1658 pages) and it will be impossible to do justice to the question involved in the last case in less than two hours' time, and counsel cannot do justice to the question involved in the first case (No. 197) in less than one hour's time.

In view of the foregoing considerations both parties respectfully move the Court to allow their counsel three hours' time for the argument of the above entitled causes so that counsel for appellant and counsel for appellee will each have one hour for the argument of case No. 197 and two hours for the argument of case No. 761.

It is respectfully represented to the Court that sustaining the within motion is in reality not granting additional time to the parties, but is simply allowing an hour and a half for the argument of each of the above causes.

Respectfully submitted,

CLAYTON B. BLAKEY, *City Attorney.*
For Appellant.

WILLIAM L. GRANBERY,
ALEXANDER P. HUMPHREY,
For Appellee.

3

Supreme Court, U. S.
FILED.
FEB 20 1912
JAMES H. McKENNEY,
CLERK.

No. 197

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911

CITY OF LOUISVILLE,

Appellant,

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY

Appellee.

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

STATEMENT, BRIEF AND ARGUMENT.

HUSTON QUIN,
JOSEPH S. LAWTON,
of Counsel.

CLAYTON B. BLAKEY,
City Attorney for the City of Louisville.

COURIER-JOURNAL JOB PRINT, LOUISVILLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 197.

CITY OF LOUISVILLE, *Appellant*

vs.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Appellee*

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

BRIEF AND ARGUMENT FOR APPELLANT, CITY OF LOUISVILLE.

STATEMENT.

May It Please The Court:

By an act of the General Assembly of the Commonwealth of Kentucky, approved April 3, 1886, a corporation under the name of The Ohio Valley Telephone Company

was created. That act is as follows (see Record, pp. 56 and 57):

"An Act to Incorporate the Ohio Valley Telephone Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1st. That James B. Speed, James Clark, H. N. Gifford, William H. Johnson, J. M. Brown, William H. Newman, and A. P. Speed, their associates, successors and assigns, be, and they hereby are, made a body corporate, with the name, The Ohio Valley Telephone Company, and as such corporation may sue and be sued, enter into contracts and have and exercise all such powers and privileges as usually appertain to corporations. That the corporators named in this section shall act as directors until their successors are elected and qualified; and in the event of the failure of any of said corporators to act, the vacancies shall be filled by election by those acting.

"2d. The capital stock of said Company shall be Five Hundred Thousand Dollars ($500,000), with the right to increase the same to One Million Dollars ($1,000,000), divided into shares of One Hundred Dollars ($100) each, which shall be personal property and evidenced by the certificates of the Company under its seal, and shall be transferable only on the books of the Company. Transfers of stock shall not be valid except as between the parties thereto until the same are regularly entered upon the books of the Company as aforesaid; and the said stock shall be paid in such manner and under such conditions as the Board of Directors may prescribe.

"3d. The said corporators above named and their survivors, of a majority of them, may receive subscriptions to the capital stock of said Company, payable at such time, place, and manner as may be specified in such subscription; and said Company may organize for business when Three Hundred Thousand Dollars ($300,000) of stock shall have been subscribed.

"4th. Said Company shall have the power to purchase, construct, maintain, and operate, within this State and elsewhere, telephone lines, exchanges, and systems, and to conduct all the business incident and pertaining thereto, and may purchase or acquire and dispose of real estate, machinery, apparatus, poles, wires, patents or interests therein, licenses, rights, and franchises relating to such business or to be used by said Company therefor; and said Company may manufacture or buy, sell, or lease any machinery, devices, patents, or interests therein, licenses and supplies.

"5th. The said Company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along, or under any highway, street, or alley in the City of Louisville, with and by the consent of the General Council of said City; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed upon, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents, or interests therein, equipments, right of way, easements and servitudes, in highways, streets, and alleys in the City of Louisville, together with all of its properties; and when purchased or leased, shall have the power to maintain and operate the same along, over, or under the highways, streets, and alleys in the said City of Louisville; provided, however, that such telephone poles, lines, and systems have heretofore been granted the right of way or easements in the highways, streets, and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip, and maintain telephone lines along, over, or under the highways, streets, and alleys, and across any water course within this Commonwealth, so as not to obstruct the same and said Company may connect its lines with those of any other Company, on such terms as may be agreed upon.

"6th. The said Company is authorized to borrow money, and may issue and sell its negotiable coupon bonds, not exceeding one-fourth of the capital stock in existence at the time of issuing such bonds, pay-

able at such times and places, and bearing such rate of interest, not exceeding six (6) per cent per annum, payable semi-annually, as may by said Company be determined, and may secure the payments of same by mortgage or deed of trust on all the property of the Company, real, personal, or mixed, and on any or all of its patents, licenses, franchises, easements, rights of way, privileges, rents, poles, and apparatus, with such term and conditions as may be expressed therein.

"7th. The principal office of said Company shall be in Louisville, Ky., and the management and administration of the affairs of the said Company shall be by a Board of Directors of not less than three (3) nor more than nine (9), to be elected by the stockholders once in every year, as may be prescribed in the by-laws, and said Directors shall hold their offices until their successors are elected and qualified; and the Directors may elect a President, Vice President, Secretary and Treasurer, and General Manager, and may appoint such other officers and agents as they may deem necessary, and may prescribe their duties and compensation, and require of them bond, with security thereon, for the faithful performance of their duties, and remove them and appoint others at pleasure; may fill vacancies that may occur in the Board, may make by-laws for the government of the Company, alter, amend, or abolish the same, at any meeting of said subscribers or stockholders of said Company. Each person shall be entitled to one vote for each share of stock standing in his name on the books of the said Company, and may cast his vote in person or by proxy.

"8th. This Act shall take effect and be in force from its passage.

"Approved April 3, 1886."

Thereafter, on August 17, 1886, there was approved an ordinance enacted by the General Council of the City of Louisville as follows (see pp. 3, 4 and 5 of the Record):

"An ordinance confirming and ratifying Section 5 of an act passed by the General Assembly of the Com-

monwealth of Kentucky, and approved on the 3d day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville.

"Whereas, The General Assembly of the Commonwealth of the State of Kentucky passed an act, entitled, 'An Act to incorporate The Ohio Valley Telephone Company,' which was approved on the 3d day of April, 1886, Section 5 of which said Act is as follows:

" 'Sec. 5. The said Company may construct, equip, and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the City of Louisville, with and by the consent of the General Council of said City; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interest therein, equipment, rights of way, easements, servitudes, in the highways, streets and alleys in the City of Louisville, together with all of its properties, and, when purchased or leased, shall have power to maintain and operate the same along, over or under the highways, streets and alleys of the City of Louisville; provided, however, that such telephone poles, lines and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip and maintain telephone lines along, over or under the highways, streets and alleys, and across any water course within this Commonwealth, so as not to obstruct the same; and

said Company may connect its lines with those of any other Company on such terms as may be agreed on.'

"Therefore, be it ordained that the said act, in so far as it refers to the constructing, equipping, operating and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating and maintaining conduits and manholes; to laying pipes, cables, conductors and wires, and operating telephone wires over, along or under the highways, streets and alleys in the City of Louisville is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said The Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the City of Louisville; provided,

"First: That the said Telephone Company, its successors and assigns, shall agree to carry on its poles, or through any underground system which it may construct, such wires or conductors as may be necessary for operating the fire and police systems of the said City of Louisville, free of charge to the said City, said wires or conductors to be furnished by the City of Louisville, and to be placed in position at the cost of said City, but under the direction of the said The Ohio Valley Telephone Company, its successors or assigns, and in such manner as not to interfere with the effective operation of the wires or conductors of said The Ohio Valley Telephone Company, its successors or assigns.

"Second: That in each and every case wherein the said The Ohio Valley Telephone Company, its successors or assigns, shall construct any underground conduit, or lay any underground pipes, cables, conductors or wires, in no case shall the City be liable for any injury or damage to any third party which may be caused by the putting down of said conduits, pipes, cables, conductors or wires by the said The Ohio Val-

ley Telephone Company, its successors or assigns; and the said Telephone Company, its successors or assigns, shall protect the City and hold it harmless from any and all damages which may arise from said cause.

"Third: The said Telephone Company, its successors or assigns, shall not at any time open or encumber more of any street, avenue, alley or sidewalk than may be necessary to enable them to perform the work with proper economy and efficiency in the laying of their pipes, cables, conductors or wires, nor shall they permit such opening or encumbrance to remain for a longer period than may be necessary to do the work for which said opening shall have been made, and they shall put up and maintain about said openings and encumbrances such barriers and lights as will effectually prevent the happening of any accidents by reason of such openings or encumbrances.

"Fourth: In constructing the conduits or in laying their pipes, cables, conductors or wires, the said Telephone Company, its successors or assigns, shall do no permanent injury to any street, avenue, alley or other public place or shade tree, nor shall they unnecessarily disturb or interfere with any sewers, water pipes or gas pipes now laid in the City or which may be laid at said time.

"Fifth: All said work of opening said streets, alleys, avenues and sidewalks, for the purpose of constructing a conduit, or of laying said pipes, cables, conductors or wires by the said Telephone Company, its successors or assigns, shall be done under the supervision of the City Engineer, and subject to his approval.

"Sixth: Whenever the said Telephone Company, its successors or assigns, shall open ground for the purpose of constructing a conduit, or of laying their pipes, cables, conductors or wires, they shall with all due diligence, after the completion of said work, restore said streets, avenues, alleys and sidewalks so opened, or any sewer, gas pipe or water pipe located thereon to a condition equally as good as when said opening was made, at their own expense and to the satisfaction of the City Engineer; and in case of their

failure or refusal to do so, the City may proceed to do the same, and the said Telephone Company, its successors or assigns, shall be liable for the cost thereof.

"Seventh: As soon as practicable after the approval of this ordinance, and before the said Telephone Company, its successors or assigns, shall be allowed to open any street, avenue, alley or sidewalk for the purpose hereinbefore stated, the said Telephone Company, its successors or assigns, shall execute a bond for the sum of $50,000.00, with good and sufficient security, in favor of the City of Louisville, conditioned that the said Telephone Company, its successors or assigns, shall hold the said City of Louisville harmless and free of all damage which may be caused by the opening of any street, avenue, alley or sidewalk for the purpose hereinbefore stated, said bond to be renewed from time to time, with such security as the General Council may require.

"Eight: Nothing in this ordinance shall be construed as to give to said Telephone Company, its successors or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors or wires in the street, avenues, alleys or sidewalks of the City of Louisville.

"Ninth: That (within thirty days from the passage of this ordinance) the said The Ohio Valley Telephone Company, its successors or assigns, shall formally agree, in writing, to accept the terms of the provisions of this ordinance, and file the said written copy of said agreement and also the aforementioned bond with the Mayor of the City of Louisville, and from and after the date of said acceptance this said ordinance shall take effect and be in force as a contract between the said City of Louisville and the said The Ohio Valley Telephone Company.

"Approved August 17, 1886."

On January 27, 1900, The Ohio Valley Telephone Company and the Cumberland Telephone Company consolidated (See Record pp. 58, 59, 60 and 61), and by virture of the laws of Kentucky and the Articles of Consolidation be-

came a corporation under the name of the Cumberland Telephone & Telegraph Company, which company is the appellee in the above styled cause.

Under the above two enactments and the consolidation the appellee, as the successor of The Ohio Valley Telephone Company, contended in the Court below:

1. That it had a perpetual right to occupy the streets of the City of Louisville;

2. That, irrespective of the soundness of the first contention, its right to occupy the streets of the City of Louisville could not be interfered with or terminated by any act of the General Council of the City of Louisville.

The Constitution of Kentucky in force in 1886 did not to any extent limit the power of the Legislature to grant franchise authorizing the use of streets in the cities of the Commonwealth.

By an act of the General Assembly of Kentucky, approved March 24, 1882, entitled "An act to amend the charter of the City of Louisville," the Legislature provided in part as follows: (See Burnett's Code, p. 498):

> "Public ways, as used in this act, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and shall be under the exclusive management and control of said City."

By an ordinance of the City of Louisville, approved November 1, 1858, the General Council of the City of Louisville provided as follows: (See Burnett's Code, p. 399):

> "Every license is granted subject to the right of the General Council to revoke it upon sufficient cause, to be judged of and determined finally by the General Council; upon such revocation the license is void, and the amount paid for such license shall be forfeited."

At the time the General Assembly of Kentucky created The Ohio Valley Telephone Company there was on the statute books of Kentucky an act known as the Act of 1856, which provided as follows:

> "An Act reserving power to amend or repeal Charters and other Laws.
>
> "Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky: That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.
>
> "Sec. II. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid.
>
> "Sec. III. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage.
>
> "Approved February 14, 1856."

(Revised Statutes of Kentucky, (R. H. Stanton) Vol. II, page 121.)

In 1891 the State of Kentucky adopted a new Constitution wherein the people of Kentucky asserted [redacted] (Sec. 3) that,

> "Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

By Section 59 of that Constitution it was ordained as follows:

> "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: * * *
> "17. To grant a charter to any corporation, or to amend the charter of any existing corporation; to license companies or persons to own or operate ferries, bridges, roads and turnpikes; to declare streams navigable, or to authorize the construction of booms or dams therein, or to remove obstructions therefrom; to affect toll-gates, or to regulate tolls; to regulate fencing or the running at large of stock.
> * * * * * * * * *
> "29. In all other cases where a general law can be made applicable, no special law shall be enacted."

By Section 60 the people of Kentucky ordained as follows:

> "The General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; but laws repealing local or special acts may be enacted. No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the Courts have jurisdiction to grant the same or to give the relief asked for. No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public

roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution."

Section 163 of the Constitution is as follows:

"No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

Section 164 of the Constitution is as follows:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

Section 166 of the Constitution is as follows:

"All acts of incorporation of cities and towns heretofore granted, and all amendments thereto, except as provided in section one hundred and sixty-seven,

shall continue in force under this Constitution, and all city and Police Courts established in any city or town shall remain, with their present powers and jurisdictions, until such time as the General Assembly shall provide by general laws for the government of towns and cities, and the officers and Courts thereof; but not longer than four years from and after the first day of January, one thousand eight hundred and ninety-one, within which time the General Assembly shall provide by general laws for the government of towns and cities, and the officers and Courts thereof, as provided in this Constitution."

The laws of Kentucky defining the rights and the powers and fixing the status of consolidated corporations is as follows (Ky. Stats. Secs. 555, 556, 561, 570 and 573):

Sec. 555. "Any two or more corporations organized under this chapter, or the laws of this or any other State, may consolidate into a single corporation; the directors, or a majority of them, of such corporations as desire to consolidate may enter into an agreement signed by them, prescribing the terms and conditions of consolidation, the mode of carrying same into effect, and stating such other facts as are necessary to be set out in articles of incorporation as herein provided (except the facts required by sub-division 5, section 2, hereof as well as the manner of converting shares of the old corporation into the new, with such other details and provisions as are deemed necessary: Provided, That such consolidated corporations shall become and be a domestic corporation of this Commonwealth for all purposes, and shall be subject to the jurisdiction of the Courts of this State and to all laws of this State regulating corporations organized thereunder, and their law shall not be construed as altering or repealing any law regulating the taxation of bridges over streams forming the boundary line of this State."

Sec. 556. "When the agreement is signed, acknowledged and recorded in the same manner as articles

of incorporation are required to be, the separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the rights, privileges, franchises, exemptions, property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

Sec. 561. "Any corporation organized under this chapter may, by the consent in writing of the owners of the majority of its shares of stock, unless otherwise provided in the articles of incorporation or amendments thereto, close its business and wind up its affairs; and when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the county, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything."

Sec. 570. "No law shall be passed for the benefit of, or in the interest of, and corporation heretofore created or organized by or under the laws of this State or any other State; nor shall any corporation avail itself of the provisions of this chapter, unless such corporation shall have previously, by a resolution adopted by its board of directors and filed in the office of the Secretary of this State, accepted the provisions of the Constitution of this State; and such resolution, or a certified copy thereof, shall be evidence for and against such corporation."

Sec. 573. "The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with

the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offence not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the Court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

Under the Charter of the City of Louisville, which was enacted by the General Assembly of Kentucky by an act approved July 1, 1893, it was provided in part as follows: (Sec. 2742, Kentucky Statutes):

"That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the Constitution and laws of this State, nor of the United States."

By another section of the Charter of the City (Sec. 2783, Kentucky Statutes) the Legislature provided as follows:

"The General Council shall have power to pass, for the government of the City, any ordinance not

in conflict with the Constitution of the United States, the Constitution of Kentucky, and the statutes thereof."

By another section of the Charter of the City (Sec. 2825, Kentucky Statutes) the Legislature provided as follows:

> "The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repairing, platting, grading improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes, market-houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and watercourses, sidewalks, curbing and the lighting of public places."

By an ordinance approved January 23, 1909, the General Council of the City of Louisville enacted an ordinance repealing the ordinance of August 17, 1886, by which repealing ordinance the General Council sought to revoke the license it had given appellee's predecessor, and to withdraw from appellee the right it had acquired, if any, from its predecessor to occupy the streets of the City of Louisville with its poles, wire, and apparatus used in the conduct of its telephone business.

That ordinance is as follows (Record, p. 11):

> "An ordinance repealing an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3d day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain

conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville ,' approved August 17, 1886.

"Be it ordained by the General Council of the City of Louisville:

"Section 1. That an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3d day of April, 1886, and entitled 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville.' approved August 17, 1886, be, and the same is, hereby repealed.

"Sec. 2. This ordinance shall take effect from and after its passage.

("Approved by the Mayor on January 23, 1909.")

After the passage of the last named ordinance the appellee filed its Bill of Complaint in the United States Circuit Court for the Western District of Kentucky setting up the charter of The Ohio Valley Telephone Company, the ordinance of 1886, the consolidation and the passage of the ordinance of January 23, 1909; and charged that the City of Louisville was asserting that it (the appellee) was occupying the streets of the City without right; that the City would proceed under the ordinance of January 23, 1909, to remove its property from the streets of the City of Louisville unless an injunction was issued preventing such action, and that the effect of the ordinance of January 23, 1909, if enforced, would be to deprive the appellee

of its property without due process of law and in contravention of the Fourteenth Amendment to the Constitution of the United States.

The prayer for relief was as follows, (Record, p. 25):

> "And your orator further prays that a provisional or preliminary injunction issue, restraining the said defendants, its officers, agents and employes, and all other persons, from any interference with the property of your orator, and any interference with its business in the City of Louisville Kentucky; and that it be restrained and enjoined from taking any action or interfering in any manner with the right of your orator to erect and maintain its poles, wires, conduits, cables and other apparatus in the streets, alleys and public places in the City of Louisville Kentucky, and from in any manner interfering with or disturbing its vested rights, or from in any manner interfering with or seeking to impair the obligation of said contract; and from in any way interfering with or disturbing its business and right to conduct a telephone business in the City of Louisville, Kentucky.
>
> "And your orator further prays that upon a final hearing, its right to conduct a telephone business in the City of Louisville, Kentucky, be declared and sustained; and that its rights secured under an act of the Legislature of the Commonwealth of Kentucky, and ratified and approved by the City of Louisville, to erect and maintain its poles, wires, cables, conduits and other structures in the streets, alleys and public places of said City, be declared and adjudged a valid and subsisting contract, and that the provisional or preliminary injunction be made perpetual."

The lower Court granted a restraining order (Record, p. 73) which was later converted into a temporary injunction, and on final hearing was made perpetual.

THE ALLEGATIONS OF THE ANSWER.

In its answer the City of Louisville admitted the passage of the Act of 1886, the ordinance of 1886, the ordinance of 1909, and the execution of the Articles of Consolidation under which The Ohio Valley Telephone Company ceased to exist and under which the appellee came into existence.

It denied that by the ordinance of 1909 the City of Louisville sought to deprive appellee of its property without due process of law; denied that it had any contract with appellee; denied that it threatened to use physical force in removing the appellee's property from the streets of the City of Louisville but admitted that it intended to use the processes of the Courts to compel appellee to remove its property from the streets of the City of Louisville.

Appellant in paragraph three of its answer (Record, p. 94) set up the fact affirmatively that appellee had operated its telephone plant in the City of Louisville in the most dictatorial, arbitrary and offensive manner, without any regard for the welfare of the citizens; and that it had grossly discriminated among its patrons in the City of Louisville.

In paragraph five of the answer (Record, p. 98) the City asserted that in 1886 it had no authority to make a contract with appellee's predecessor, and that if the City had in 1886 attempted to make any such contract it had exceeded its authority and its act in that respect was null and void.

In conclusion the City asked that the Bill of Complaint be dismissed and that it be discharged with its costs.

THE EVIDENCE.

Considerable proof was taken by the appellant, all of which tended to show that the immediate cause for the

passage of the repealing ordinance was the fact that appellee had grossly discriminated among its patrons in the City of Louisville.

On final hearing a decree was entered sustaining appellee's charges and making the temporary injunction permanent.

From that decree this appeal is prosecuted.

PART TWO.

SPECIFICATIONS OF ERRORS RELIED UPON.

The following are the specifications of errors on which appellant bases this appeal (Record, p. 187):

"And now, on the 16th day of December, A. D. 1909, comes the defendant by its solicitors, and says that the decree entered in the above cause on the 8th day of December, A. D. 1909, is erroneous and unjust to the defendant.

"1st, Because by said decree the ordinance of the General Council of the City of Louisville, approved August 17, 1886, by and under which ordinance The Ohio Valley Telephone Company was authorized to construct, equip and operate a telephone system in the City of Louisville and make use of the streets of said City for said purpose, was adjudged to be a valid and binding contract between the City of Louisville and the said The Ohio Valley Telephone Company, its successors and assigns, and not subject to be repealed or annulled by the General Council of the City of Louisville.

"2nd, Because by and under said decree it was adjudged that the General Assembly of the State of Kentucky by an act entitled 'An Act to incorporate The Ohio Valley Telephone Company,' approved April 3, 1886, granted unto The Ohio Valley Telephone Company the right to construct, equip and operate a telephone system in the City of Louisville by and with the consent of the General Council of the City of Louisville, and to use the public streets of said City for said purpose; and further adjudged that upon the granting of such consent by the General Council of the

City of Louisville such a right or franchise became vested in The Ohio Valley Telephone Company, its successors and assigns, subject to repeal only by the General Assembly of the State of Kentucky.

"3d., Because by and under said decree it was adjudged that the ordinance enacted by the General Council of the City of Louisville, and approved January 23, 1909, repealing the ordinance of August 17, 1886, which granted unto The Ohio Valley Telephone Company the right to use the streets of the City of Louisville for the purpose of conducting a telephone business in the City of Louisville, was void and of no effect.

"4th, Because by and under said decree it was adjudged that upon the consolidation of The Ohio Valley Telephone Company with the Cumberland Telephone & Telegraph Company all the rights acquired by The Ohio Valley Telephone Company under its charter, and under the said ordinance, approved August 17, 1886, passed to the Cumberland Telephone & Telegraph Company, and are now owned by and vested in the Cumberland Telephone & Telegraph Company.

"5th, Because by and under said decree it was adjudged that the City of Louisville be, and it was, permanently enjoined from enforcing the provisions of said ordinance of the General Council of the City of Louisville, approved January 23, 1909.

"6th, The defendant further says that in the record and proceedings aforesaid there is manifest error in this, that the Court erred in overruling the demurrer interposed by the defendant to the orginal complaint filed in said cause, and by upholding and deciding that the facts stated in said bill of complaint were sufficient to constitute a cause of action and said Court erred in rendering judgment against defendant in said cause."

PART THREE.

BRIEF.

I.

Power to grant a franchise does not exist in a city unless expressly conferred.

Nellis on Street Railways, Section 23.
Louisville City Railway Company vs. City of Louisville, 8 Bush 415.
East Tennessee Telephone Co. vs. City of Russellville, 106 Ky. 669.
Henderson vs. City of Covington, 14 Bush, 312.

II.

A valid franchise authorizing a telephone company to occupy the streets of a city entitles such telephone company to an absolute and exclusive appropriation of that space in the streets which is occupied by its telephones poles.

St. Louis vs. Western Union Telegraph Company, 148 U. S. 97, 37 L. Ed. 383.

III.

When a telephone company acquires from the State authority to use the streets of a city by and with the consent of the city, its franchise to use such

streets is acquired from the State; the grant from the municipality is a mere revocable license.

Booth on Street Railway laws, Section 10.
Nellis on Street Railways, Section 20.
Boise City Artesian Water Company vs. Boise City, 123 Fed., 232.
Detroit Citizens Railway Company vs. Detroit Railway Company, 171 U. S., 48. S. C. 110 Mich., 384.
City of Detroit vs. Detroit City Railway Company, 56 Fed., 867.
Wabash Railroad Company vs. City of Defiance, 167 U. S., 88.
East Ohio Gas Company vs. City of Akron, 90 N. E., (Ohio) 40.
Blair vs. City of Chicago, 201 U. S., 400.
Home Telephone & Telegraph Company vs. Los Angeles, 211 U. S., 273.
Chicago City Railway Company vs. People, 73 Ill., 541-547.
People vs. Chicago Telephone Company, 220 Ill., 338; 77 N. E. 245.
Parkhurst vs. City of Salem, 32 Pacific (Oregon) 304.
Gas Company vs. Parkersburg, 30 Pacific (W. Va.) 435.
New Haven and Northhampton Company vs. Hamersley, 104 U. S. 1.

IV.

A franchise granted by a city silent as to the length of time during which it may be exercised is not a perpetual franchise to occupy the streets unless the city had express authority to grant a perpetual franchise.

Boise City Artesian Water Company vs. Boise City, 123 Fed., 232.

Detroit Citizens Railway Company vs. Detroit Railway Company, 171 U. S., 48. S. C. 110 Mich., 384.
City of Detroit vs. Detroit City Railway Company, 56 Fed., 867.
Wabash Railroad Company vs. City of Defiance, 167 U. S., 88.
East Ohio Gas Company vs. City of Akron, 90 N. E., (Ohio) 40.
Blair vs. City of Chicago, 201 U. S., 400.
Home Telephone & Telegraph Company vs. Los Angeles, 211 U. S., 273.
Chicago City Railway Company vs. People, 73 Ill., 541-547.
People vs. Chicago Telephone Company, 220 Ill., 338; 77 N. E. 245.
Parkhurst vs. City of Salem, 32 Pacific (Oregon) 304.
Gas Company vs. Parkersburg, 30 Pacific (W. Va.) 435.
New Haven and Northhampton Company vs. Hamersley, 104 U. S. 1.
Linden vs. LaRue, 23 How., 435.
Charles River Bridge vs. Warrens Bridge, 11 Pet., 419.
Fanning vs. Gregaire, 161 How., 528.
Wright vs. Nagel, 101 U. S. 791.
Buffalo & Jamestown R. R. Co. vs. Faulkner, 103 U. S., 821.
Los Angeles vs. Los Angeles Water Co., 177 U. S., 571.
Mills vs. St. Clair County, 81 How., 561.

V.

A grant of a franchise irrevocable and permanent in its nature made by a city without express authority from the legislature to make such grant is void.

Milhan et. al. vs. Sharp et. al., 27 N. Y., 611.
West End, etc. Co. vs. Atlantic, etc., Co., 49 Ga., 151, 155.

State of New York vs. Mayor, etc., 3 Duer., 119.
Blaschko vs. Wurster, 156 N. Y. 432.
Ampt. vs. City of Cincinnati, 21 O. Cir. Ct., 300.
Birmingham vs. Birmingham St. R. Co., 79 Ala, 465, 473.
Westminster Water Co. vs. City (Md., 1904), 56 A., 990.
Central Transportation Co. vs. Pullman P. C. Co., 139 U. S. 24, 60.

VI.

A void act of a municipal body will not be validated by the adoption of a new State Constitution.

East Tennessee Telephone Company vs. Russellville, 106 Ky., 673.

VII.

When two corporations consolidate a new corporation comes into existence which is eo instanti granted by the State only such portion of the rights and privileges of the constituent corporations as the State at the time had the power to grant.

Kentucky Statutes, Section 566.
Shields vs. Ohio, 95 U. S., 319.
Ferguson vs. Meredith, 2 Wallace, 25; 17 Law Rep. 604.
Atlantic & Gulf Railroad Company, vs. Georgia, 98 U. S. 359.
Maine C. R. Co. vs. Maine, 96 U. S. 499.
Keokuk & W. R. Co. vs. Missouri, 152 U. S. 301.
Pennsylvania College Cases, 37 Wall., 552.
Yazoo & M. V. R. Co. vs. Adams, 180 U. S. 1.
Wright vs. Georgia Railroad & Banking Co., 216 U. S. 422.

VIII.

All charters, franchises and special privileges granted by the Kentucky Legislature subsequent to 1856 are subject to revocation.

Louisville Water Company vs. Clark, 143 U. S., 1.
Covington vs. Kentucky, 173 U. S., 331.

IX.

All franchises and special privileges granted by the State of Kentucky prior to the adoption of the present Constitution and which were revocable, remain subject to revocation.

Kentucky Constitution, Section 3.

IX a.

Before appellee came into existence the Legislature of Kentucky revoked the grant which it had made to the Ohio Valley Telephone Company.

Kentucky Statutes, Section 573.

X.

The Legislature is powerless to revoke any franchise or right which the appellee may have acquired to use the streets of the City of Louisville.

Kentucky Constitution, Sections 59 and 60.

XI.

The State of Kentucky has delegated to the City of Louisville authority to revoke any franchise which

the appellee may have acquired to occupy the streets of the City of Louisville.

Kentucky Constitution, Sections 156, 163, 164, 199.
Kentucky Statutes, Sections 2742, 2783, 2825.

XII.

The Legislature had authority to delegate to the city the right to revoke any franchise which the appellee may have acquired to use the streets of the City of Louisville.

Sioux City Railway Company vs. Sioux City, 138 U. S., 98.
Missouri Pacific Railroad Co. vs. State of Kansas, 216 U. S., 262.

XIII.

All special privileges or grants made to corporations prior to the adoption of the present Constitution and inconsistent with the provisions of that Constitution and the laws made pursuant thereto are now repealed.

Hager, Auditor, vs. Kentucky Title Company, 119 Ky., 50.
Pearce vs. Mason County, 99 Ky., 357.
McTigue vs. Commonwealth, 99 Ky., 72.

XIV.

Where a city gives its consent for a telephone company to use its streets without limit as to time the right of such telephone company to continue to

use the streets expires when the charter of the city expires.

Blair vs. Chicago, 201 U. S., 485.
People vs. Chicago Telephone Company, 220 Ills. 238.
Parsons vs. Breed, 126 Ky. 765.
City of Louisville vs. Vreeland, 140 Ky., 404.

XV.

A city cannot convert a license into a contract by calling it a contract.

St. Louis vs. Western Union Telegraph Company, 148 U. S. 97.
Wabash Railroad Company vs. Defiance, 167 U. S. 88.

XVI.

A city may revoke a grant or a license without notice to the grantee and without assigning reasons therefor.

Calder vs. Michigan, 218 U. S. 598.
United States vs. Des Moines Nav. & R. Co., 142 U. S. 510.

XVII.

Discrimination among its patrons gives a city ample cause for revoking the franchise of the telephone company.

Wyman on Public Service Corporations, Chapters 27 and 28.
Delaware & S. Telephone Co. vs. Kelly, 160 Fed. Rep. 517.
State of Missouri vs. Bell Telephone Co., 23 Fed. Rep. 541.
Rudd vs. New York, 143 U. S. 517.
L. & N. vs. Central Stock Yard, 97 S. W. 778.

PART FOUR

ARGUMENT.

I.

The ordinance under which the Ohio Valley Telephone Company acquired the right to occupy the streets of the City of Louisville was a mere consent or license granted by the City and revocable at the will of the City.

From the statement of facts it will be seen that this court is called on to construe the Act of 1886 incorporating The Ohio Valley Telephone Company, and the ordinance of 1886 under which that company was authorized to occupy the streets of the City of Louisville, and to determine,

First: Whether the City was authorized by that Act to make a contract with the Telephone Company.

Second: Whether the City did make a contract with the Telephone Company.

Third: Whether the Act in question authorized the City to grant a franchise to the Telephone Company.

Fourth: Whether the City did grant a franchise to the Telephone Company.

Fifth: If the City did make a contract with the Telephone Company or did grant it a franchise, then is that contract or that franchise revocable at the will of the City, and if not revocable, did the Telephone Company acquire a vested right to occupy perpetually certain portions of the streets of the City?

The solution of all these propositions are so intimately connected that a discussion of one will necessarily involve a discussion of all.

At the outset it must be conceded that the state Legislature has absolute control of the public highways of a city except in so far as it has delegated that control to the municipality.

It must also be conceded that a municipality acquires from a State Legislature no power except that which is expressly delegated to it, or so strongly implied as to be equivalent to an express delegation of authority.

It must also be conceded that the authority which a municipality exercises in the control of its streets is an authority which it exercises in its governmental capacity, and that any attempt on the part of a municipality to surrender governmental control of its streets will be closely scrutinized and strictly construed against a grantee.

If these principles were not adhered to it might not be long before the cities of this country instead of being a convenience to the citizens would be used in various ways to compel the citizens to submit to innumerable hardships and inconveniences, and the City would itself constitute a public nuisance of the most serious and troublesome description.

Mr. Nellis in his late work on Street Railways, (Sec. 23) speaking of the power of a municipality to grant a franchise, said:

> "The power to grant a franchise does not exist in the local authority unless unmistakably conferred by the legislature or indispensably necessary to the excise of some power expressly conferred."

In 1886 the City of Louisville did not have power to grant a franchise to a telephone company to occupy its streets.

That such was the law was determined by the Court of Appeals of Kentucky in an opinion written by Judge Lindsay (afterwards Senator Lindsay) in the case of Louisville City Railway Company vs. City of Louisville, 8 Bush, 415. In that case the Legislature had authorized the Railway Company "to construct, maintain and operate single or double track railways over any such streets or highways within the City of Louisville as its General Council might authorize." The General council authorized the Railway Company to lay its tracks along certain streets under certain conditions and subsequently required it by ordinance to replace its rails with a different make of rail. The Kentucky Court of Appeals in passing on the authority of the City in this respect said:

> "The General Assembly of the Commonwealth has delegated to it (the City) for the common benefit the power to regulate and control these streets and highways * * *. Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street."

The City had the same authority over its streets in 1886 that it possessed when the opinion in the above case was rendered.

In the case of East Tennessee Telephone Co. vs. City of Russellville, 106, Ky. 669, the Court of Appeals of Kentucky said:

> "Previous to the adoption of the present Constitution, the council of a municipal corporation, with-

out legislative authority, could not grant to any person or corporation the right to use the streets and alleys of a city or town for any purpose, other than for which they were dedicated."

In the case of Henderson vs. City of Covington, 14 Bush, 213, it was held by the Court of Appeals of Kentucky that under the Constitution in force in 1886, only those powers were conferred on cities which were clearly granted by the Legislature, and that all such powers should be strictly construed.

It must, therefore, be conceded that but for the charter of The Ohio Valley Telephone Company the City of Louisville was without authority in 1886 to pass the ordinance under which the appellee claims its right to occupy the streets of the City of Louisville.

By that charter The Ohio Valley Telephone Company was granted the right to construct a telephone system "along or under any highway, street or alley in the City of Louisville with and by the consent of the General Council of the City."

It is the contention of the City that the language used did not authorize it to grant the telephone company a franchise; that the only authority which it acquired was the authority to give its consent that the telephone company might use its streets, and that the consent which it was authorized to give was a mere license which was subject to revocation at any time.

The General Council embodied Section 5 of the act of the ordinance wherein it gave the consent of the city to the use of its streets, and then ordained

"that the said act, in so far as it refers to the constructing, equipping, operating and maintaining tele-

> phone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating and maintaining conduits and manholes; to laying pipes, cables, conductors and wires, and operating telephone wires over, along or under the highways, streets and alleys in the city of Louisville is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said The Ohio Valley telephone Company, its successors and assigns, to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the city of Louisville."

By this language the city contends that it did nothing more than consent to the use of its streets by the telephone company; that it did not thereby make an irrevocable contract with the telephone company, and certainly that it did not agree with the telephone company that it might perpetually preempt certain portions of the City's public streets for its own exclusive use.

That the locating of telephone poles, wires and other apparatus in the streets of a city is the preempting of that portion of the street for the exclusive use of such telephone company is self evident.

In the case of St. Louis vs. Western Union Telegraph Company, 148 U. S. 97, 37 L. Ed. 383, this Court, (Justice Brewer delivering the opinion) in discussing the effect of such a grant said:

> "We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies. * * * And all that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive

appropriation of that space in the streets which is occupied by the telegraph poles."

In support of the City's contention that the privilege granted by the ordinance of 1886 was revocable I first call the attention of the Court to the work of Mr. Booth on Street Railway Laws, Section 10, where he says that a franchise is a privilege conferred by sovereignty upon natural or artificial persons to exercise powers which they could not lawfully assume except in pursuance of such a grant, and he adds:

> "But where a company is incorporated by the Legislature, which confers upon it specific power to construct, maintain, and operate a railway in a city, subject, however, to the consent of the city, and in such manner and upon such conditions as the city may impose, and the latter, by ordinance, grants the privilege of construction and operating the railroad upon a certain street, the grant by the municipality is held to be a mere license, and not a franchise."

Mr. Nellis in his work on Street Railways, Section 20, says:

> "There are certain other privileges, too, which are merely licenses, and not franchises, as where a corporation has a specific power to construct, maintain, and operate a railroad in a city, subject, however to the consent of the city, and in such manner and upon such conditions as the city may impose; if the city, by ordinance, grants the privilege of constructing and operating the railroad upon a certain street, the grant by the municipality is a mere license, and not a franchise."

The case of Boise City Artesian Water Company vs. Boise City, 123 Fed., 232, from the Circuit Court of Appeals for the Ninth Circuit, Judge Gilbert delivering

the opinion, was a case in which it appeared that Boise City had granted to Eastman and his successors the right to lay pipes in the streets and furnish water to the inhabitants of Boise City. There was no time limit placed on the franchise. Judge Gilbert used this language in speaking of the ordinance in question:

> "The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. In the Constitutions of nearly all the states it is provided that no exclusive or perpetual franchises shall be granted, and, irrespective of such constitutional limitation, it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets."

The Court then proceeded to hold that the City had ample authority from the Legislature to grant the privilege in question, but further held that the Legislature did not give explicit consent to Boise City to surrender irrevocably its control over its streets. And therefore, said the Court:

> "From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own

waterworks, or to grant a franchise to another company. The most that the licensee could claim under it was that it legalized their use of the streets for supplying water, and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

I next call the Court's attention to the construction placed on an act of the Legislature of Michigan wherein the Detroit City Railway Company was authorized to operate a street railway in the City of Detroit by and with the consent of that city; and also to the construction placed on the ordinance passed pursuant to that act.

Concerning the above mentioned legislative enactments and the interpretation thereof, there are five reported cases. One of those cases reached this Court and the opinion may be found in 171 U. S. 48, 43 L. Ed. 67, (Detroit Citizens Railway Company vs. Detroit Railway Company). In that case it appeared that the General Assembly had by a general law provided as follows:

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them: Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe: Provided, further, that, after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchise so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and opera-

> ting such railway in the street in such consent or grant named, pursuant to the terms thereof."

Under the ordinance enacted by the City, the Detroit City Railway was

> "exclusively authorized to construct and operate railways as herein provided, on and through (certain specified streets), and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit and assented to in writing by said corporation * * * * And provided the corporation does not assent in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route."

In 1894 the General Council of Detroit authorized another railway company to construct and operate lines of street railway along the same streets over which the the franchise to the Detroit City Railway Company.

The Detroit City Railway Company sought to enjoin the exercise of the franchises granted in 1894 on the theory that the act of the Legislature and the ordinance above referred to created a contract between it and the City of Detroit, and that the ordinance of 1894 was an abrogation of that contract.

Attention is especially called to the language used in the act of the Michigan Legislature above referred to, as compared with the language used in the Charter of The Ohio Valley Telephone Company. In the case at bar there is nothing but a plain right created whereby The Ohio Valley Telephone Company was authorized to use the streets of the City of Louisville provided it first obtained

consent from the City of Louisville. In the Detroit Railway case the act of the Legislature entitled the railway company to the *"exclusive right"* to operate any railway constructed by it in the City of Detroit, on condition that it first obtain the consent of the municipal authorities; it being further provided that after such consent was given and accepted, the City of Detroit should make no conditions "whereby the rights or franchises so granted shall be destroyed or unreasonably impaired or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street."

From a reading of the opinion in question it will be found that this Court reached the following conclusions:

First, that the act did not explicitly and specifically confer on the city authority to grant an exclusive privilege to the railway company to occupy its streets;

Second, that the City of Detroit had no inherent power to grant the franchise in question;

Third, that neither by the express terms of the act in question, nor by implication did the Legislature authorize the city to make the grant in question;

Fourth, that the City of Detroit acquired from the act in question no authority except the right to consent to the railway company's laying down its track, which consent was subject to revocation.

In concluding the opinion Justice McKenna for this Court, used the following language:

> "Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it. A municipality is a governmental agency—its functions

> are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.
>
> Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Here then is a case in which by language even stronger than that used in the case at bar, the city was authorized by an act of the Legislature to give its consent to the use of the streets, and which language moreover prohibited the city from impairing any obligation created by the passage of such an ordinance. And notwithstanding the language of that act this Court held that the railway company could not by virtue of that act acquire from the city a right such as that claimed by appellee in the case at bar.

True, the question of perpetual right in the streets was not directly in issue in that case, but the language used by this Court clearly shows that the principle involved was as to whether a grant, unlimited in its nature, made by a city would be upheld unless the city had express authority from the Legislature to grant such unlimited franchise. And I submit that the principle is the same irrespective of whether the unlimited grant is of an exclusive franchise or a perpetual franchise. There can be no distinction drawn between the two characters of grant insofar as the principle is concerned.

As to the other reported opinions wherein these legislative acts were construed, I first call the Court's attention to the fact that the opinion of this Court in 171 U. S. affirmed the opinion of the Supreme Court of Michigan in 110 Mich., 384.

The next one of these cases in which these legislative acts were involved, is the case of City of Detroit vs. Detroit City Railway Company, 56 Fed., 867. In that case Judge Taft of the Sixth Circuit wrote an exhaustive opinion:

The object sought in that case was an injunction to compel the Detroit City Railway Company to remove its tracks from the streets, the contention being that its rights had expired by limitation on May 9, 1893, 30 years after the granting of the franchise. The railway company contended that under the ordinance of 1879 its right had been extended for 30 years from that date and did not expire until 1909. Judge Taft for the Court in discussing the various questions raised held that the franchise of the railway company was granted by the State of Michigan and that the City of Detroit had merely given the railway company a license to occupy the streets, which license was revocable at the will of the General Council. In this connection Judge Taft said:

> "It would seem to follow that under the general power to regulate the use of the streets the city council might permit or license a street-railway company, if it has the requisite franchise from the state, to lay its tracks in the streets and to run its cars thereon. But this would only be in the exercise by the council of legislative power. The same council, or a succeeding one, might, in its discretion, revoke the license. It must be so, because it is well established that in such subordinate legislative bodies it is not permitted to one to abridge the legislative power of

its successors without express sanction of law. The first council permits a railway in a street because it is of opinion that such a use will best conduce to the public interest. When another council succeeds, it may conclude that the conditions have changed; that other, more important, traffic in the street is interrupted and blocked by street cars confined to one or two rigid tracks; and that it would serve the public interest as well to have the tracks laid in a parallel street. Under the exercise of its legislative power to regulate the use of the street, unless limited or abridged, the second council could require the removal of the tracks."

Judge Taft further held that a proper construction of the rights of the City of Detroit compelled him to decide that the City of Detroit had no right to make a contract with a railway company whereby it might operate its cars in the streets of Detroit for thirty years. In this connection the following language was used:

"It necessarily follows, having regard to the strict rule of construction already discussed, that while, under its legislative power of regulating the use of the street, the council may permit a railway to be laid in the streets, it cannot, by virtue of that power, agree that such a use shall continue for 30 years. This is the exercise, not of a legislative, but of contractual, power. It is an abridgment of the legislative power by contract. It is the grant of a vested right in the streets to the railway company, whereby, for 30 years, it shall have a private ownership in tracks *in situ*, and the exclusive right to run cars over them. Never, until the street cars were adopted, was such an exclusive right in the surface of the streets permitted. The power to control the use of the streets had always been in municipalities, but it had never been exercised to grant such an easement."

Judge Taft also held that the right claimed by the railway company could be granted only by express author-

ity from the Legislature; that such express authority had not been given and that, therefore, the city had no right to make a contract with the railway company which would give the railway company a vested right in the streets for any particular period of time.

Judge Taft discussed at some length the character of the franchise which the railway company received from the State and city, and in this connection held that the railway company received from the State a franchise which became perfected upon obtaining from the city the consent of the city to operate; that the corporate life of the franchise was thirty years and that the city was powerless to consent to the use of its streets for a period longer than the corporate life of the company. He further held that the city had the right to "reduce the time for which the franchise may be actually enjoyed to a time less than the life of the corporation." If the reasoning of Judge Taft in this respect is sound then it follows where a grant from the Legislature is to take effect upon the consent of the city and no time limit is placed either by the Legislature or the city, the corporate life of the corporation being perpetual, either the Legislature or the General Council may at any time terminate the life of the franchise.

The next case in which these legislative enactments were construed was the case of Detroit City Railway Company vs. City of Detroit, 64 Fed. 628. In this case the decree entered on the basis of Judge Taft's opinion was reversed by the Circuit Court of Appeals, Judge Lurton rendering the opinion. The soundness of the principles of law enunciated by Judge Taft was however, not questioned by the Circuit Court of Appeals. The opinion of that Court was based on the question of whether the city or the legis-

lature had granted the franchise. It will be remembered that Judge Taft decided (and this Court stands with him in that conclusion) that the State of Michigan had granted the franchise, and that the authority obtained by the railway company from the City of Detroit was a mere revocable license. The Circuit Court of Appeals reached a different conclusion holding that the State of Michigan was without power to grant such a franchise; that under the Constitution of Michigan and the Charter of the City of Detroit, exclusive authority had been granted to Detroit to grant such franchises in that city, and that the legislature was without power to grant a franchise for the use of the streets of Detroit. In this view of the case Judge Lurton held that the ordinance enacted by the City of Detroit was the grant of a franchise and that the City of Detroit had express authority from the legislature under its Charter and under the Constitution of the State to grant an exclusive franchise. Judge Lurton based his opinion in this respect on the case of Allor vs. Wayne County, 43 Mich. 76-97, where the Michigan Court used this language:

> "No business which is in its nature municipal can be controlled by the State or by other outside authority."

Judge Lurton said three things were essential under the law of Michigan in order that the railway company might be permitted to operate its railway in the City of Detroit.

First, Corporate capacity which it must acquire from the State;

Second, a franchise to operate a railway, which could

come only from the State; and

Third, "A right to occupy particular streets with the necessary tracks and equipment. * * *. The third equally essential requisite could not come from the State. If acquired at all it must come from the municipality within which it was proposed to exercise its substantial franchise."

From the reading of these opinions it must be conceded that a city cannot grant a franchise unlimited either as to time or as to the exclusive nature thereof, unless it has either express authority, or authority so strongly implied as to be equivalent thereto.

In the case of Wabash Railroad Company vs. City of Defiance, 167 U. S. 88, 42 L. Ed. 87, the legislature enacted the following law on the subject of railroads occupying the streets of a city:

> "If it be necessary in the location of any part of a railroad to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers, or authorities owning or having charge thereof, and the company, *may agree upon the manner, terms, and conditions* upon which the same may be used or occupied."

Under this Act the General Council of the City of Defiance passed an ordinance authorizing the railroad company to erect new bridges over two highways on certain conditions, one of which was that the approaches and sidewalks along the bridges should be kept in repair by the company. This right was granted the railroad company without any limitation as to the time the company should be permitted to enjoy it. It was conceded that under this authority the railroad company had built the

bridges in question and had built and maintained the sidewalks as provided by the ordinance.

It was contended by the railroad company that the grant created by the city was a contract which the city was powerless to revoke. Section 2 of the ordinance provided that the entering upon the work of constructing the bridges by the railroad company should be taken as an acceptance of the terms of the ordinance and regarded as superseding any contract theretofore existing between the company and city. In construing this clause of the ordinance the court said:

> "This section, however, does not change that which, in its nature, is a license into a contract that these bridges shall remain for any particular length of time. The entering upon the work of construction might well estop the railroad company from objecting to the requirement that the bridge should be constructed in the manner specified in the ordinance; and might also estop the city from making any further or different requirements in that connection; and to this extent there may be said to have been a contract; but when it is claimed that the city thereby agreed that the bridges so constructed should remain forever, and that it thereby waived its rights to change the grade or the method of crossing, we are importing into the contract by construction something which is not found there; which the parties have not agreed to, and which, if the city had any power at all to stipulate, should have been expressed in the clearest language."

On the question of whether the ordinance in question created a contract between the parties which the city was powerless to revoke this court said:

> "If it were possible that the city could make such a contract at all, it could only be done by express authority of the legislature and in language that

would admit of no other interpretation. It is claimed that the construction of the sidewalks by the railroad company was a consideration, since it had been the duty of the city up to that time to keep them in repair, but it surely could not be a consideration for the perpetual maintenance of the bridges. If it were a consideration for anything it would simply be for the permission given to the railway to build the bridges—a permission obtained upon a special application of the railway company. Properly construed, this ordinance was simply a license to the company to build these bridges, and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing."

In a recent case in Ohio the Supreme Court of that State held that an ordinance granting a gas company the right to use the streets of the City of Akron in the conduct of its business and containing no clause limiting the grant as to time was not a perpetual franchise. The case I refer to is East Ohio Gas Company vs. City of Akron, 90 N. E. 40. That case was a much stronger case than the case at bar. There the gas company was authorized by its charter to acquire natural gas and dispose of "same in certain towns and cities named therein, the defendant in error being one." The gas company "applied to the council of the City of Akron for its consent that the plaintiff in error should enter said city," and use the streets in the conduct of its business. Consent was given by the city by an ordinance, which ordinance "was entirely silent as to the length of time during which the gas company might exercise the privilege thus granted." Thereafter the gas company saw fit to withdraw from the City of Akron and cease doing business therein. Whereupon the City of

Akron sought and obtained an injunction enjoining the gas company from so withdrawing.

It will thus be seen that the converse of the proposition involved in the case at bar arose in the Ohio case. Here the telephone company claims that the city cannot revoke its consent and require it to vacate the streets, whereas the Akron Gas Company contended that the consent given by the city was not a contract and that it could at any time surrender its franchise and cease to operate in the City of Akron. Judge Davis delivered the opinion of the Court and I call the attention to the first paragraph of the opinion to show the deliberation with which the opinion was prepared:

> "This case was orally argued and submitted six months ago; but, on account of its great importance to the public as well as to all public service corporations, we have given it unusual consideration, and we have reached our conclusions only after most careful deliberation."

As stated above, the Court found that the consent given by the city was not a contract, but was revocable by either party at any time. In this connection the Court said:

> "The consent of the city for that purpose (the gas company's use of its streets) was granted by the ordinance, and it was accepted by the gas company; but no stipulation was made and accepted as to the time when the use of the streets for the purposes of the gas company should end. * * *. Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But, if the company enters by virtue of the contract and can with-

draw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion."

Therefore, the court concludes:

"It comes, then, to this: That, in the absence of limitation as to time, the termination of the franchise is indefinite, and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

Here, therefore, is a case the facts in which were certainly more favorable to the public service company than are the facts as shown in the case at bar; and yet, the Supreme Court of Ohio after long deliberation and without a dissenting voice held a franchise such as that granted to the appellee subject to revocation at any time by the proper city authorities.

It seems to me that the criterion for determining the rights of the parties as laid down in the Ohio case is logical. If the gas company could be required to serve the City of Akron throughout all time then it was because of the mutual agreement between the parties under which the gas company acquired a perpetual right to occupy the streets of the City of Akron.

Applying the same principle to the rights of the parties in the case at bar the conclusion is inevitable that if ap-

pellee's contention is sound, then the appellee can be compelled throughout all time to conduct a telephone business in the City of Louisville, a situation I "feel quite sure that even the defendant in error, on more mature reflection, would not insist upon."

In the case of Blair vs. City of Chicago, 201 U. S. 400, 50 L. Ed. 801, this court through Justice Day construed an ordinance almost identical with the one under consideration. In that case it will be remembered the State of Illinois granted to certain street railway companies the right to occupy the streets of the City of Chicago by and with the consent of the general council of the City of Chicago. The City of Chicago passed numerous ordinances, some of which were not limited as to time. In connection with one of these ordinances Justice Day used this language:

> "In the west side system, the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets, a point which we do not feel called upon to decide."

Again Justice Day used this language:

> "Before the passage of the Act of 1865, incorporating the board of trustees of the town of Lake View, the supervisors granted permits to use some of the highways of Lake township. This authority was exercised under Sections 5 and 6 of the Act of February 14, 1859. We cannot agree that the duration of these permits would be in perpetuity, because of the fact that no time was specifically named in them."

Home Telephone & Telegraph Company vs. Los Angeles, 211 U. S. 273, 53 L. Ed. 182. Here Justice Moody for this Court discussed the right of a city to surrender by contract its power to regulate rates:

> "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required."

In the above case Justice Moody further said:

> "The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself."

In Chicago City Railway Company vs. People, 73 Ill. 541-547, a railway company was authorized to construct its tracks along certain streets of Chicago upon obtaining from the City of Chicago consent thereto. The city gave its consent on condition that the track be constructed within a certain time. The track was not constructed within the time and the city agreed to an extension of the time. The property owners objected to this and claimed

that the franchise had been forfeited. The court in passing on this question used this language:

> "But in the case at bar the grant in the ordinance is not a franchise, but a mere license, a permission to construct a railway in a certain street within a limited period. A franchise, according to the definition given by Blackstone, is a royal privilege, or branch of the King's perogative, subsisting in the hands of the subject, and, being derived from the crown, must arise from the King's grant. 2 Blackstone, 17. Corporate franchises in the American states emanate from the government, or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. The grant or license given by the ordinance comes within no definition of a franchise."

People vs. Chicago Telephone Company, 220 Ill. 338, 77 N. E. 245. Here the Supreme Court of Illinois, construing a grant by a city to a telephone company to occupy the streets of a town without limit as to time, said:

> "Such grants cannot be construed to be perpetual, and at most cannot extend beyond the lives of the corporations granting them."

In the case of Parkhurst vs. City of Salem, 32 Pacific Rep. 304, 23 Oregon 41, the charter of the City of Salem contained a clause wherein it was authorized to "permit, allow and regulate the laying down of tracks for street cars and other railroads on such streets as the council may designate upon such terms and conditions as the council may prescribe." Under this power the General Council of the City of Salem attempted to grant to a railway company an exclusive franchise for thirty years to operate a street railway in the City of Salem. The

Supreme Court of Oregon held that the city charter did not by

> "express terms confer upon the city the power to grant an exclusive franchise for a street railway, nor can such power be implied, because it is not essential to carry into effect the powers expressly given. Bennett vs. Denison, 145 U. S. 135, 12 Sup. Ct. Rep. 819; Com. vs. Railway Co., 27 Pa. St. 339."

In the case of Gas Company vs. Parkersburg, 30 Pa. 435, (W. Va.) the town of Parkersburg did not have express authority to grant an exclusive franchise to a gas company and the Supreme Court of Appeals of West Virginia held that an attempt by ordinance to make such a grant was void. In passing on this question the Court used the following language:

> "The exercise of such power may be convenient, but that is not sufficient; it must be essential and indispensable to the powers expressly granted, or to the declared objects and purposes of the corporation."

In the case of New Haven and Northhampton Company vs. Hamersley, 104 U. S. 1, this Court construed an act of the Connecticut Legislature wherein it was provided that no railroad company should abandon any station on its road "except by the approval of the railroad commissioners." The railroad company with the approval of the commissioners abandoned a certain station. Thereafter a legislative enactment required the railroad company to relocate the abandoned station. The railroad company claimed that the act whereby it was permitted by the Railroad Commissioners to abandon the station was a contract

between the company and the State, but this Court in response to that contention said:

> "The commissioners were given no power to contract for the State or the public. All they could do was to say yes or no, to a simple request by the Company for leave to abandon an old station."

In further support of the proposition of law that an unlimited grant to public service corporations made by a city will not be upheld unless the city had express authority to make such grant, I call the Court's attention to the following reported cases:

Linden vs. LaRue, 23 How. 435.
Charles River Bridge vs. Warrens Bridge, 11 Pet. 419.
Fanning vs. Gregaire, 161 How. 528.
Wright vs. Nagel, 101 U. S. 791.
Buffalo & Jamestown R. R. Co. vs. Faulkner, 103 U. S. 821.
Los Angeles vs. Los Angeles Water Co., 177 U. S. 571.
Mills vs. St. Clair County, 81 How. 561.

The Court's attention is especially called to an ordinance of the City of Louisville which was in force in 1886 under which the General Council of that City ordained as follows:

> "Every license is granted subject to the right of the General Council to revoke it upon sufficient cause, to be judged of and determined finally by the General Council; upon such revocation the license is void, and the amount paid for such license shall be forfeited." (See Burnett's Code, p. 399).

If the right granted to appellee was a mere license, as the Courts have held, then the section of the ordinance

above referred to applies and appellee has no grounds for complaint.

It follows that if the City attempted to make a grant or a contract irrevocable in its nature, such attempt was without authority of law and is void. This proposition of law is so well established that I will not elaborate on it, but will content myself with referring the Court to the numerous reported cases heretofore cited and to the following additional cases:

Milhan, et al. vs. Sharp, et al., 27 N. Y. 611.
West End, etc., Co. vs. Atlantic, etc., Co., 49 Ga. 151, 155.
State of New York vs. Mayor, etc., 3 Duer. 119.
Blaschko vs. Wurster, 156 N. Y. 432.
Ampt. vs. City of Cincinnati, 21 O. Cir. Ct., 300.
Birmingham vs. Birmingham St. R. Co., 79 Ala. 465, 473.
Westminster Water Co. vs. City (Md. 1904), 56 A. 990.
Central Transportation Co. vs. Pullman P. C. Co., 139 U. S. 24, 60.

If such attempt on the part of the City resulted in a void act, then the adoption of the present Constitution did not validate it.

The Court of Appeals of Kentucky in the case of East Tennessee Telephone Company vs. Russellville, 106 Ky. 673, said:

> "It was not the purpose of the Constitution to render valid a resolution of the Board of Councilmen, which under the law at the time of its adoption was invalid."

I am not unmindful of the fact that the New York Court of Appeals in the case of People vs. O'Brien, 111 N. Y. 1, 2 L. R. A. 256, handed down an opinion which

seems to be at variance with the contention here made, and no doubt great stress will be laid on that case. But a reading of the first page of the opinion will convince this Court that the principle there laid down has no significance here, so different are the facts in that case from those in the case at bar.

In the New York case the railway company received from the State its corporate life, and from the city its franchise to operate a street railway. The legislature repealed the act under which the railway company was incorporated thereby destroying the corporate existence of the company, but the Court held that such repeal did not destroy the franchise which the company had received from the city; that the franchise granted by the city was without limit as to time; that the city had power to grant it and that the receiver of the defunct corporation could sell and assign that franchise to third parties.

The Court in that opinion at the very outset holds that the city acquired its right to dispose of the franchise from the Constitution itself. The Court in finding such to be the fact used the following language:

> "The framers of the Constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who would pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the Legislature alone, and authorized its acquisition by contract from such municipality. Re New York Cable R. Co., 11 Cent. Rep. 485, 109 N. Y. 32; Troy vs. Troy & L. R. Co., 49 N. Y. 657."

But, assuming, for the sake of argument, that the principle enunciated in the New York case is sound law

and applicable here, then even though the legislature were to repeal the Act of 1886, under which The Ohio Valley Telephone Company was incorporated, such repealing act would have no effect whatever on the rights of the parties. Appellee could still contend that its franchise to occupy the streets of the City of Louisville was obtained from the City of Louisville; that that franchise was not limited as to time; that it (appellee) had acquired the franchise of The Ohio Valley Telephone Company, and that the repeal of the charter of The Ohio Valley Telephone Company had no effect whatever on its rights in the streets of the City of Louisville.

I submit that such a conclusion is the logical outcome of applying to the case at bar the principles laid down in the New York case. And if so, then this Court is brought face to face with a situation which it, and practically every Court in the land, has met and decided adversely to appellee's contention,—a situation in which a public service corporation has claimed that a municipality has for all time surrendered to it the use and occupancy of the public highways, and that without either express or implied authority to do so.

In support of his finding in favor of appellee the lower Court cited the following cases:

Detroit vs. Detroit Citizens St. Ry. Co., 184 U. S. 386.
City Railway Co. vs. Citizens St. Ry. Co., 166 U. S. 563.
Wolf vs. New Orleans, 103 U. S. 366-7.
Von Hoffman vs. City of Quincy, 4 Wallace 554.

The principles of law enunciated in the above cases have no bearing whatever on the case at bar.

Without exception the opinions in all the cases cited were based on findings of fact to the effect that the city had express authority from the legislature to do the things which it had done, including the making of contracts.

As said by the Circuit Court in the case of Cleveland Electric Railway Company vs. City of Cleveland, 137 Fed. 124.

> *"Surely so slender a thread was never intended to support so ponderous a weight."*

II.

When two corporations consolidate a new corporation comes into existence, which is eo instanti granted by the state only such portion of the rights and privileges of the constituent corporations as the State at the time had the power to grant.

As shown by the Bill of Complaint The Ohio Valley Telephone Company and the Cumberland Telephone & Telegraph Company consolidated on the 27th day of January, 1900, (Record, p. 2). The Articles of Consolidation appear on page 68 of the record.

By the 6th clause of those articles, (Record, p. 60), it was provided as follows:

> "This company shall commence or begin to exist on the day that these Articles of Incorporation shall be filed and recorded in the office of the Secretary of the State of Kentucky, and it shall continue to exist for the period of two hundred years from and after said date."

By the 11th clause of the Articles of Incorporation it was further provided, (Record, p. 60):

> "Upon the execution and completion hereof, this consolidated corporation shall be vested with all the

> property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities, and powers, and privileges, and franchises of this corporation, and the rights and duties of its stockholders shall be the same as those of the consolidating companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations."

By referring to the statement of the case, (pp. 13-14), the provisions of the present Constitution and the laws governing the consolidation of corporations may be found.

Under those provisions of the State Statutes and especially Section 556 of the Kentucky Statutes it will be seen that upon the consolidation of two corporations

> "the separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation * * * subject to all the provisions of this charter and other laws relating to it."

This Court has frequently considered the effect of the consolidation of two corporations under State laws and has uniformly held that such consolidation has the effect of destroying the old corporations and of creating a new one; that as a matter of law the old corporation is as dead as if it had never existed; that the new corporation acquires only such powers, rights, privileges and franchises as the Legislature had the power to grant at the time the consolidation took effect, and that any rights which any constituent corporation possessed prior to the consolidation ceased to exist where such rights were inconsistent with the statute law at the time of the consolidation.

It is scarcely necessary to elaborate on this principle of law and I shall not do so other than to refer the Court to some of the opinions bearing on the subject.

The first case I call to the attention of the Court is that of Shaw vs. Covington, 194 U. S., 596. In that case this Court was called on to construe the statute law of Kentucky (Sections 555, 556, Ky. Stats.) governing the consolidation of corporations, and those sections were construed in conformity with the contention made by the appellant in the case at bar.

It was there held that a corporation which had obtained from the Legislature in 1882 an exclusive right to use the streets of Covington for transmitting electricity, had lost that right by consolidating with another corporation subsequent to the enactment of Sections 555 and 556. In the opinion in question this Court said:

> "We think we have shown that the policy of the law at the time of the passage of the Consolidation Statute (Ky. Stat. Section 556, Act of April 5, 1893) was entirely opposed to the continuance of such a special right as is claimed."

Section 556 was amended by the Legislature on March 21, 1902, and that section as amended appears on pages 13 and 14 of this brief.

As there copied that section is not the section which was in force on January 27, 1900, (the date of the consolidation), nor was it the section which was in force on the date on which the Electric Light Company consolidated with other corporations as shown in the Shaw case above referred to.

Section 556 as it appeared on the Statute books in 1894 and in 1900 when the consolidations above referred to took

place is as follows: (I have enclosed in brackets the words added by the amendment of March 21, 1902):

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporations are required to be, *the* (all) separate existence of the constituent corporations shall cease and the consolidated corporations shall become a single corporation in accordance with the said agreement and subject to all the provisions of this chapter and other laws relating to it, and shall be vested with all the (*rights, privileges, franchises, exemptions*), property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

The mere fact that the Legislature saw fit to amend Section 556 so as to include "rights, privileges, franchises and exemptions" is conclusive of the fact that it did not intend, by the former Act, to grant to the consolidated company any of the "rights, privileges, franchises and exemptions" of the constituent companies.

See Frederick Electric Light Company vs. Frederick City, 84 Md. 599, 36 L. R. A. 130; People vs. Wemple, 129 N. Y. 543, 14 L. R. A. 708.

The authorities cited in the following pages clearly show that appellee could not have obtained from the Legislature in 1900 the right to use the streets of the City of Louisville.

In the case of Sheilds vs. Ohio, 95 U. S. 319, 24 L. Ed. 359, the opinion was written by Justice Swayne and involved a construction of an act of the Ohio Legislature authorizing railroad corporations to consolidate. In that case one of the constituent companies going to make up the consolidated company had the right under its charter

(which charter was not repealable at the time it was granted) to charge 5 cents a mile for passenger service. After the charter of the railroad company was granted, a new Constitution was adopted by the State of Ohio wherein it was ordained that all special privileges thereafter granted should be subject to alteration or repeal by the General Assembly.

Under an act of the Legislature corporations were permitted to consolidate. Section 3 of that act was as follows:

> "And such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations by the several Acts incorporating the same, or relating thereto respectively, and shall be subject to all the duties imposed by such Acts, so far as the same may be consistent with the provisions of this Act."

After the adoption of the new Constitution the State of Ohio passed an act prohibiting railroads from charging more than 3 cents a mile for passenger service. The railroad company in question consolidated under the above legislative enactment with another railroad company. The question then arose as to whether the privilege or right which the railroad company acquired under its charter, (viz., to charge 5 cents a mile) was still in force or whether that right ceased to exist upon the consolidation.

Justice Swayne for this Court, in speaking of the status of the respective corporations on the date of the consolidation, said:

> "The consolidated company had then no existence. It could have none while the orginal corporation

subsisted. All—the old and the new—could not co exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence."

As to the new corporation it was said:

"It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the Acts authorizing the consolidation; no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant."

Again, it was said:

"When the consolidation was completed, the old corporations were destroyed; a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred. The same legislative will created and endowed the new corporation. It did one as much as the other. In this respect, there is no ground for any distinction.

"These views are sustained by several well considered cases exactly in point. One of them embodies the unanimous judgment of this court. Clearwater vs. Meredith, 1 Wall. 25, (68 U. S. XVII. 604); McMahan vs. Morrison, 16 Ind. 172; State of Ohio vs. Sherman, 22 Ohio St. 411; Shields vs. Ohio State, 26 Ohio St. 86.

"The constitutional provision that no 'special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly,' entered into the Acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the Act."

In the case of Ferguson vs. Meredith, 2 Wallace 25, 17 Law Ed. 604, Justice Davis for this Court delivered an opinion in which was involved the status of three consolidated railroad corporations. In that opinion Justice Davis used this language:

> "The effect of the consolidation 'was a dissolution of the three corporations, and at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those passing out of existence.' McMahon vs. Marrison, 16 Ind. 172."

Atlantic & Gulf Railroad Company vs. Georgia, 98 U. S. 359, 25 L. Ed. 185. In this case the question of exemption from taxation after consolidation was involved and this Court (Justice Strong delivering the opinion) used the following language:

> "To illustrate: the stockholders of the Savannah and Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic and Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities and privileges by virtue of the consolidation Act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes

into existence under a fresh grant. Not only its being, but its powers, its franchises and immunities, are grants of the Legislature which gave it its existence.

"If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany and Gulf Railroad Company went out of existence when their stocks were consolidated under the Act of the Legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation Act of 1863. That Act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy.

"It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted."

After referring to the State law the Court then says:

"Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the Code became, in substance, a part of the charter. R. R. Co. vs. Maine, 96 U. S. 499 (XXIV, 836)."

The Court in the above case also held that the Legislature by retaining the right to repeal thereby retained the right to revoke any franchises or privileges which the corporation might possess, among which was exemption from taxation.

To the same effect are the opinions in the following cases:

Maine C. R. Co. vs. Maine, 96 U. S. 499, 24 L. Ed. 386.

Keokuk & W. R. Co. vs. Missouri, 152 U. S. 301, 38 L. Ed. 450.
Pennsylvania College cases, 37 Wall. 552.
Yazoo & M. V. R. Co. vs. Adams, 180 U. S. 1, 45 L. Ed. 395.
Wright vs. Georgia Railroad & Banking Co., 216 U. S. 422, 54 L. Ed. 544.

The opinions in the above cases disclose the fact that the legislative acts under which the corporations referred to were permitted to consolidate were almost identical with the State law of Kentucky on the subject. As a matter of fact the language used in the Kentucky act is stronger if anything than that used in the various acts referred to in the above opinions.

If it be true, as was said by this Court in 98 U. S. 359, that "*the new company comes into existence under a fresh grant; not only its being, but its powers, its franchises and immunities, are grants of the Legislature which gave it its existence,*" then on the consolidation of The Ohio Valley Telephone Company with the other company, the Ohio Valley Telephone Company ceased to exist and the new company instead of taking the franchises and rights which The Ohio Valley Telephone Company had obtained from the Legislature, in reality took from the Legislature such portions only of the franchises of the old company as the Legislature of Kentucky could grant at the time the consolidation took place. In other words, appellee is not exercising any powers or privileges which were granted to The Ohio Valley Telephone Company. It is exercising the powers and privileges only which were granted to it by the Legislature at the time it came into existence. Those powers and privileges were identical with the ones exercised by The Ohio Valley Telephone Company to the

extent that such powers and privileges were not inconsistent with the law of the State at the time of the consolidation.

It, therefore, becomes important to determine whether the right claimed by the appellee to occupy the streets of the City of Louisville free from interference by the City of Louisville could have been granted to it in 1900 by the Legislature.

The lower Court was of the opinion that the rights acquired by the appellee in the streets of the City of Louisville were acquired under the charter of The Ohio Valley Telephone Company and, while admitting that those rights were subject to revocation, held that the Legislature alone could revoke them. In this connection the lower Court used the following language:

> "That body (the Legislature) might, we presume, if thinking it wise and just, repeal the complainant's franchise and charter, whether it injured complainant or not."

The fallacy of this position is apparent when we come to consider the manner in which the Legislature would proceed should it attempt to revoke those rights and privileges. Obviously the only thing the State could do to accomplish such a result would be to repeal the charter of The Ohio Valley Telephone Company.

Now, if the language of this Court in the cases above cited means anything, then the State in passing such an act would be doing a vain thing. What could be accomplished by repealing the charter of a corporation which had ceased to exist, and the status of which was as if it had *"never existed,"*—had never *"enjoyed the franchises so conferred?"*

It must be conceded that the Legislature cannot, under Sections 59 and 60 of the present Constitution, enact a law revoking the charter rights, privileges or franchises exercised by the appellee. (See Statement of) Those rights were acquired under a general corporation law through which every corporation organized in the State of Kentucky since 1893 claims its existence. There is a bare possibility that the Legislature might repeal that general law, thereby terminating the life of the appellee along with thousands of other corporations in Kentucky, but such a procedure on its part would be unheard of in the annals of legislation.

It must, therefore, be conceded that the appellee's right to occupy the streets of the City of Louisville exists, if at all, under one of the two following grants:

One. The grant contained in the ordinance of 1886.

Two. The grant made by the State of Kentucky to the appellee at the time it came into existence under the consolidation.

That it did not get such a grant from the General Council in 1886 I think is clearly shown in the foregoing part of this brief.

That it could not get such a grant at the time the consolidation took place, it will be my purpose to show in the following pages.

I first call attention to Section 3 of the present Constitution of Kentucky wherein it is ordained by the people of Kentucky that

> "Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

At the time the charter of The Ohio Valley Telephone Company was granted the Act of 1856 was in full force

and effect in Kentucky. This Court has construed the Act of 1856 as applied to the charters of corporations granted subsequent thereto and has in every instance held that such a charter

> "must be read as if all the provisions of the Act of 1856 were incorporated in it."

Louisville Water Company vs. Clark, 143 U. S. 1, 36 L. Ed. 55.
Covington vs. Kentucky, 173 U. S. 331, 43 L. Ed. 680.

The Act of 1856 provides that all grants to corporations made subsequent thereto "shall be subject to amendment or repeal at the will of the Legislature unless a contrary intent be therein plainly expressed." See statement

Any rights or privileges, therefore, that were acquired by The Ohio Valley Telephone Company were acquired subject to revocation.

It is impossible to read the present Constitution of Kentucky without being impressed with the idea that the framers of that instrument intended to curb as far as possible the greed of franchise grabbers and public service corporations, and to make it impossible for public service corporations to obtain perpetual and nonrepealable grants and franchises from the State or any subordinate arm of the State.

That this was the intention of the framers of the Constitution is indicated by the fact that the Legislature itself was prohibited from granting franchises. (Sections 60-163-164).

Municipalities were prohibited from granting franchises without first offering them for sale to the highest

bidder, and then for no longer a period than twenty years. (Sec. 164).

It would indeed be a revelation to the framers of that Constitution were they told that the very language by which they had intended to prevent public service corporations from acquiring perpetual and irrevocable franchises, had made that perpetual and irrevocable which prior thereto had been subject to revocation. Yet this is precisely what the framers of the Constitution did if the contention of the appellee is upheld. For certain it is the Legislature had power before the new Constitution was adopted to revoke the franchise granted to The Ohio Valley Telephone Company. Certain it is the Legislature is now powerless to revoke that franchise, and unless the City can revoke it then there is no escaping the conclusion that an irrevocable and perpetual right does exist. And if it does exist then Section 3 of the Constitution is a dead letter.

But it is said by appellee that the City has not been authorized by the Legislature, even if the Legislature could grant such authority, to revoke the franchise which the appellee exercised in the streets of the City of Louisville.

To this contention I cannot agree. Under the Constitution of Kentucky (Section 156) the Legislature was directed to confer on municipalities such legislative powers as it might see fit.

By Section 163 it was provided as follows:

> "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts

> or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been therefore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

By another section of the Constitution (Section 199) the General Assembly was authorized to make certain regulations concerning telephone companies, but in order that there might be no question as to the rights of a city to control its streets the framers of the Constitution concluded that section by saying:

> "Nothing herein shall be construed to interfere with the rights of cities or towns to arrange and control their streets and alleys, and to designate the places at which, and the manner in which, the wires of such companies shall be erected or laid within the limits of such city or town."

When the Legislature complied with the mandate of the Constitution and enacted laws for the government of the City of Louisville it provided (Section 2742) that cities of the first class (of which the City of Louisville is one) shall have

> "power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act, nor the Constitution and laws of this State, nor of the United States."

Again (Section 2783, Ky. Stats.) the Legislature provided as follows:

> "The general council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Kentucky and the statutes thereof."

As to the City's control over its streets, the Legislature provided (Section 2825, Ky. Stats.) that the Board of Public Works shall have *exclusive control* of the streets and the use thereof under the ordinances of the City.

It, therefore seems that the Legislature has surrendered to the City absolute control of all local matters, has delegated to the City authority to enact laws for its government, has delegated to the City exclusive control over its streets and the use to be made of its streets. It appears moreover, that the Constitution has deprived the Legislature of the power to revoke appellee's right to use the streets of the City of Louisville, but has specially ordained that the right to so use the streets shall remain revocable. It is therefore self evident that the City has been given authority to revoke the appellee's grant.

That is was eminently appropriate for the Legislature to delegate to the City the power it had to revoke the franchise in question is apparent from a consideration of other powers delegated to the City.

For instance, to the City is delegated absolute power over the streets. The City and the City alone is authorized to grant franchises in the future. The City and the City alone can say what public service corporations may or may not occupy the streets of the City.

How can it be logically said in view of all these facts that it was not appropriate for the State to delegate to the City the right to revoke a franchise which had always been revocable?

I am not able to refer Your Honor to any specific case upholding a delegation of power such as that delegated to the City of Louisville in the case at bar, but I call your attention to two opinions handed down by this Court

wherein it seems to me that the same principle of law was involved. In both cases this Court held that it was not inappropriate for the Legislature to grant to a subordinate arm of the State such power of revocation.

The first case I call attention to it that of Sioux City Railway Company vs. Sioux City, 138 U. S. 98, 34 L. Ed. 989, where the railway company had obtained from the General Council a franchise to operate a street railway in Sioux City. One of the terms of the ordinance under which the franchise was granted, required the railway company to pave the space between the rails.

At the time this ordinance was enacted there was a general law reserving to the State power to amend or revoke all grants.

After granting the franchise Sioux City became a city of the first class and under its then charter it was authorized to require the railway company to pave the space between the rails and for one foot on the outside of each outer rail.

The railway company contended that its franchise was a contract with the city which could not be impaired by a subsequent ordinance or legislative enactment.

It was contended, however, by the city that

> "no matter what the provisions of the ordinance were, it was within the power of the Legislature to enact laws imposing an additional tax upon the Company, and within the power of the City, acting under such a law, to make the charge upon the property of the company."

Justice Blatchford delivered the opinion of the Court and in upholding the city's contention said:

> "The right to operate the railway in the streets is a franchise obtained through power given to the

City by the State, but the State reserved the power to regulate such franchise and impose conditions upon it. It reserved the power to determine the question of the exemption of the company from taxation and to prescribe what burdens should be imposed upon it for the public good in the enjoyment of its franchise. Manifestly, such power of the State would exist, if the right to occupy the streets with tracks were granted to the company directly by an Act of the Legislature of the State; and the case is not changed by the fact that the franchise was granted by the City. There is nothing in the ordinance of the City Council which takes away the power of the State and the City to impose additional taxes on the property of the company."

Finally the Court said:

"There was nothing in the ordinance of December 12, 1883, which bound or could bind the City not to exercise its statutory authority to impose other conditions upon the exercise of the rights of the Company."

Here then is a case in which a franchise was granted under certain conditions, which conditions were subject to revocation by the State, *but not by the city granting the franchise.*

Subsequently, under a State law the city was authorized to repeal one of the conditions contained in the grant of the franchise, and this Court upheld both the power of the Legislature to grant such authority to a city and the power of the city under its authority from the Legislature to revoke such condition.

In the case of Missouri Pacific Railroad Co. vs. State of Kansas, 216 U. S. 262, 53 L. Ed. 472, the charter of the railroad company was granted at a time when the State

had the authority to alter, amend and repeal all legislative enactments.

Under one of the provisions of the charter the railroad company was permitted to determine where it would locate railway stations. The Railroad Commission was subsequently authorized to regulate the location of stations, and this Court in the above case held that a regulation made by the Railroad Commission was a valid regulation and did not violate the contract contained in the railroad company's charter.

In other words, the railroad company was permitted under a legislative act to locate a station at a particular place.

Afterwards the Railroad Commission, a subordinate arm of the State, was authorized to change the location theretofore made.

But why discuss the question of whether or not the City of Louisville was granted the power to revoke the franchise which The Ohio Valley Telephone Company obtained in 1886 when the very act under which appellee came into existence and under which it claims its right in the streets of the City of Louisville revoked that franchise?

The statute law of the State of Kentucky governing corporations is embodied in the General Statutes of Kentucky, Sections 538 to 883 inclusive.

Under Sections 555, 556, 557 and 558 of the Kentucky Statutes corporations are permitted to consolidate.

Section 573 of the Kentucky Statutes is in part as follows:

> "The provisions of all charters and articles of incorporation, whether granted by special act of the

> General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, *and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897.*"

Here then is an express repeal of every right the Legislature had granted to The Ohio Valley Telephone Company which "*could not be obtained under the provisions of this chapter.*" Certain it is that appellee could not under that chapter obtain the right to use the streets of the City of Louisville, much less could it obtain a perpetual right.

As to the intention of the Legislature in enacting Section 573 of the Kentucky Statutes I call the Court's attention to the case of Senn vs. Levy, 111 Ky. 318, where the Court of Appeals of Kentucky in construing that section said:

> "When we consider these sections together, it is clear that the General Assembly intended to put private corporations in this state upon the same footing, and to force all existing corporations to surrender, as far as possible, special or exclusive rights and privileges held by them, by the acceptance of the new Constitution."

The Legislature certainly had authority under the Constitution to revoke the rights and privileges which it had granted in 1886; and if plain, simple language, such as that used by the General Assembly in enacting Section 573 of the Kentucky Statutes, means anything, it means the revocation of the right to use the streets of the City of

Louisville which The Ohio Valley Telephone Company received from the State of Kentucky.

But it is said that Section 163 of the Constitution contains a clause which takes away from a city the control of its streets in all cases where the Legislature had, prior to the present Constitution, granted to public service corporations the right to occupy the streets.

This could be conceded without affecting the soundness of the City's contention. That section of the Constitution means exactly what it says and, as I construe it, does not conflict with the position taken by the City.

It is conceded that if the telephone company had acquired from the Legislature prior to the present Constitution a right to occupy the streets of the City of Louisville for a definite length of time, then during that time the City would be powerless to interfere with that use, provided there had been no consolidation and provided the Legislature had not authorized the City to revoke such franchise. Such a situation does not exist for two reasons.

First, because the appellee did not acquire any right whatever prior to the adoption of the present Constitution. It did not come into existence until after the adoption of the present Constitution. Any grant or right it may have to occupy the streets of the City of Louisville was obtained by it at the time it came into existence.

Again, the right if it exists either under the ordinance or the Act of 1886 was not granted for a definite period of time, but was subject to revocation at any time either by the City or State.

For these reasons it seems to me that appellee's contention in this respect is of no avail.

On the question of the general effect of the present Constitution on special charters granted prior thereto, I call attention to the case of Hager, Auditor, vs. Kentucky Title Company, 119 Ky. 50. In that case it appears that real estate title companies are now authorized to incorporate under a general corporation act. The Kentucky Title Company was granted its charter prior to the present Constitution and under that charter it acquired special privileges which it could not acquire under the general corporation law of the State. It was contended that because the Kentucky Title Company had not accepted the provisions of the present Constitution it could not claim under the general corporation law, and was estopped to deny that it was exercising the special privileges granted to it by its charter. The Court of Appeals of Kentucky in answer to this contention said:

> "If the position of counsel for the Commonwealth is correct, then a corporation which enjoys privileges under legislative charters could keep them in force by failing to accept the Constitution, although the Legislature had repealed the acts granting them. The effect of this would be to give corporations irrevocable privileges."

The Court of Appeals of Kentucky did not deem it necessary to do other than decide what the effect of such contention would be, viz, the establishment of "irrevocable privileges." It required no argument to refute such a contention.

In the case of Pearce vs. Mason County, 99 Ky. 357, the Court of Appeals of Kentucky said:

> "The General Assembly may repeal any of these special acts by a special act for that purpose, or by

> substitution of comprehensive general laws. * * * Such special acts as are inconsistent with those provisions of the Constitution which do not require legislation to enforce them stand repealed."

In the case of McTigue vs. Commonwealth, 99 Ky. 72, the Court of Appeals of Kentucky said:

> "We may note that even without further legislation all laws non-consistent with the Constitution, and we believe not consistent with its spirit, which are not in terms repealed or made consistent in the meantime, stand repealed at the expiration of six years after the adoption of the Constitution."

The charter rights and franchises which The Ohio Valley Telephone Company acquired from the Legislature were surrendered and the appellee took its rights and privileges under the general corporation laws of the State. Under those general corporation laws of the State appellee could not take any rights whatever in the streets of the City of Louisville. Certainly it could not and did not take a perpetual or irrevocable franchise.

Before I conclude what I have to say on this phase of the case I want to call the Court's especial attention to the spirit of the present Constitution of Kentucky and the purpose which the framers of that instrument had in mind when they drafted it. There are so many sections and clauses of that Constitution, the spirit, if not the letter of which would be violated by upholding appellee's contention, that it would be a hopeless task to call attention to all of the points that might be made in refutation of the position taken by appellee.

Since writing the foregoing brief I have had occasion

to examine again Section 60 of the Constitution and especially to note the following part of that section:

> "No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law."

In other words, as there was a general law enacted by the framers of the Constitution (viz., Sections 163 and 164 of the Constitution) under which public service corporations might acquire the right to use the streets of a city, then it was not within the power of the Legislature to enact a law under which appellee might come into existence as a corporation and take from the Legislature the right to occupy the streets of the City of Louisville. That is to say, the Legislature when it came to enact the law governing the consolidation of corporations was confronted with the Constitution of the State which prohibited it from granting a franchise authorizing the use of City streets. If the statute under which appellee came into existence purported to give appellee authority to use the streets of the City of Louisville, to that extent the statute was in conflict with the general law on the subject, viz., the Constitution, and was void.

Appellee in reality took only such right from the State as it could have obtained had there been no consolidation and had it simply filed its Articles of Incorporation in the County Clerk's office. The filing of such Articles of Incorporation would have permitted it to operate a telephone system in the State of Kentucky, but would not have permitted it to use the streets of the City of Louisville unless it first obtained from the City of Louisville a franchise as required by Section 164 of the Constitution.

III.

Where a city gives its consent for a telephone company to use its streets without limit as to time the right of such telephone company to continue to use the streets expires when the charter of the city expires.

The City of Louisville had a Charter in 1886 under which it was authorized to conduct its municipal affairs. While acting under this Charter it was given express authority by the Legislature to consent to the use of its streets by The Ohio Valley Telephone Company. The State subsequently repealed the Charter of the City of Louisville and enacted for it another Charter under which it is now conducting its municipal affairs.

If the opinion of this Court in the case of Blair vs. Chicago, 201 U. S. 485, is to control, then the right which The Ohio Valley Telephone Company acquired in the streets of the City of Louisville terminated upon the expiration of the old Charter of the City of Louisville.

In the Blair case this Court found from the facts that the town of Lake View had by ordinance permitted a street railway company to use its streets, no time being specifically named in the grant. The street railway company contended that this grant authorized it to occupy the streets in perpetuity. The act of the Legislature under which the railway company obtained its franchise directed that the consent of the trustees of towns should be had before the streets of such towns might be used by the railway company. The town of Lake View was subsequently annexed to the City of Chicago, its Charter thereby ceasing

to exist. Mr. Justice Day for this Court in discussing the effect of the grant made by the town before its Charter expired, said:

> "The ordinances making these grants required the company to perform certain duties to the municipalities, such as the laying of pavement, subject to the approval of the trustees."

The Court held that such a consideration did not alter the situation and (to quote further from the opinion) said:

> "We think in such case that the terms granted would not extend beyond the life of the corporation conferring them, where there was no attempt to confer a definite term, assuming, without deciding, that it was within the authority of the municipality to grant a perpetuity."

Mr. Justice Day then proceeded to discuss at some length the case of People vs. Chicago Telephone Company, 220 Ill. 238, 77 N. E. 245, in which it was held that a grant to a telephone company for no definite period could not be construed to be in perpetuity and in no event could such a grant exist beyond the life of the municipality granting it.

The following language used by the Supreme Court of Illinois was quoted in the Blair case with approval:

> "The ground of the defendant's claim that the ordinance does not limit its charges in the annexed territory is that, before the annexation, the minor municipalities had granted to it the right to occupy the streets therein for its business, without any limits as to time. If the grants had been for terms of years under legislative authority authorizing them, and the term had extended beyond the existence of the corporations granting the privileges, there might be ground for saying that the grants were binding upon the

City, because they had become binding contracts, under which the defendants had vested contract rights for such term; but they were not for definite periods, and the grants were in consideration of furnishing something to the town or village, such as telephone service to the town or village hall or the village authorities, free or for some reduced rate. Such grants cannot be construed to be perpetual, and, at most, cannot extend beyond the lives of the corporations granting them. Upon annexation there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant could continue, discharged of the obligation annexed to it. * * * The ordinances of the City extended over the annexed territory immediately upon annexation. (Illinois C. R. Co. vs. Chicago, 176 U. S. 646, 44 L. Ed. 622, 20 Sup. Ct. Rep. 509), and the limitation of the ordinance applied to the annexed territory."

"This" (referring to the above opinion of the Supreme Court of Illinois) "seems to us a reasonable view," is the language used by Mr. Justice Day in concluding the opinion.

That the present Constitution and the laws passed pursuant thereto did repeal the Charter of the City of Louisville is shown conclusively by reading the opinions of the Court of Appeals of Kentucky in the case of Parsons vs. Breed, 126 Ky. 765, and City of Louisville vs. Vreeland, 140 Ky. 404.

In the Vreeland case (140 Ky.) it appeared that the Legislature had in 1886 by a special act incorporated the Louisville Gas Company. Section 9 of that act created a Gas Inspector for the City of Louisville and fixed the salary to be paid by the City of Louisville for his services. After the adoption of the new Constitution and the grant-

ing of the new Charter the City continued to appoint a Gas Inspector as provided in the Charter of the Gas Company until 1910. The question was then raised as to whether the new Constitution and the Charter of 1893 had repealed that portion of the Charter of the Gas Company under which the Gas Inspector was provided for. The Court of Appeals held that the new Charter of the City had so repealed Section 9 of the gas Charter, giving the following reason therefor:

> "All the special acts governing any of the municipalities were repealed by the general laws adopted by the Legislature pursuant to the constitutional requirements for the government of the cities of the State. It was not necessary that Section 9 of the Charter of the Louisville Gas Company should be specifically repealed. The general laws passed pursuant to the Constitution are all the laws of the State governing municipalities. All previous special legislation as to this city or that, necessarily ceased when the general laws were passed."

Again the Court said:

> "It was not necessary that the General Assembly should repeal special acts relating to this city or that, creating this office or that and defining its duties; these acts all passed out as the necessary result of the new scheme which the Constitution provided for. It is true that repeals by implications are not favored, but this is not a case of implied repeal. It is a case of express repeal provided for by the Constitution itself. (Halzhause vs. Newport, 94 Ky. 402; Lexington vs. Wilson, 97 Ky. 707; McInerney vs. Huelfeld, 116 Ky. 228; Parsons vs. Breed, 126 Ky. 759; Com. vs. Porter, 113 Ky. 582). No effect can be given the fact that since 1892 Gas Inspectors have been appointed for the City and have been paid $3,000 a year."

In the case in 126 Ky., the Court in discussing the effect of the Constitution and laws passed pursuant thereto on the charter rights of municipalities, said:

> "The new legislation was not only required by the Constitution to be, but was designated by the Legislature to be, in lieu of all that had theretofore existed on the subject, by every implication repealing the old charters in all their features. Nor was it necessary to specifically enumerate all the matters repealed. The old system was repealed *ipso facto*, by the general new legislation adopted on the subject of charters of cities of the first class, in obedience to the constitutional mandate. Board of Park Commissioners vs. Du Pont, 110 Ky. 743, 20 Ky. Law Rep. 106, 62 S. W. 891. This repeal included the statute creating the office of principal engineer, the manner of its being filled, and its term."

It would seem, therefore, that the Charter of the City of Louisville in force in 1886 was expressly repealed "by the Constitution itself" in 1891. Such being the case all permits, licenses and grants made by the City prior thereto, not definite as to time, expired with the expiration of that Charter.

IV.

A city cannot convert a license into a contract by calling it a contract.

The ordinance under which The Ohio Valley Telephone Company acquired from the City of Louisville consent to use its streets has a clause to the effect that when the ordinance is accepted the terms thereof shall be a contract between the City and the Telephone Company.

In the first place calling a writing a contract does not make it a contract.

As shown in the preceding pages of this brief the City had no authority from the Legislature to make a contract, and any attempt on its part to make a contract was ineffectual.

In the second place, no consideration for the making of such a contract passed from the Telephone Company to the City. The right to use the telephone poles for the City's fire alarm system was never taken advantage of by the City. The appellee did not in its Bill of Complaint, nor in its proof, lay any claim to this clause of the ordinance as a consideration to support the contract in question.

A similar situation arose in the case of St. Louis vs. Western Union Telegraph Company, 148 U. S. 97, 37 L. Ed. 383. There the City had the right to use the telegraph poles for telegraph purposes free of charge. In speaking of this right this Court said:

> "There is nothing, either, in the agreed facts, as to the use of the top cross-arm of any poles by the City of St. Louis."

This Court accordingly held that the agreement contended for did not reach the dignity of a valid consideration.

In this connection the language used by this Court in the case of Wabash Railroad Company vs. Defiance, 167 U. S. 88, and which has been heretofore referred to, is more to the point than any language I could make use of. It will be remembered that the City of Defiance in that case had by ordinance granted to the railroad company

the right to construct certain bridges. One of the clauses of that ordinance was as follows:

> "Sec. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges."

It was contended by the railroad company that the language of this section had the effect of perfecting a contract between the City and the railroad Company. This Court in discussing that contention said:

> "This section, however, does not change that which, in its nature, is a license into a contract."

V.

A city may revoke a grant or a license without notice to the grantee and without assigning reasons therefor.

It is charged in the Bill that the City revoked the right of the appellee to occupy the streets of the City of Louisville without giving it notice and without assigning any just cause therefor.

The passage of the ordinance revoking the right of the appellee was the exercise by the General Council of its legislative and governmental functions. The exercise of these functions cannot be examined into by Courts.

This Court sustained the soundness of this principle of law in the recent case of Calder vs. Michigan, 218 U. S. 598, 54 L. Ed. 1167, where it was held, (Mr. Justice Holmes delivering the opinion), that it was not within the province

of a Court to examine into the reasons impelling a legislative body to revoke a franchise. From that opinion I quote the following extract:

> "The plea alleged that the City of Grand Rapids was a rival of the company in furnishing water, and that the mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the Legislature without notice to the company."
>
> * * * * * * * * *
>
> "But we do not inquire into the knowledge, negligence, methods, or motives of the Legislature if, as in this case, the repeal was passed in due form. United States vs. Des Moines, Nav. & R. Co., 142 U. S. 510, 544, 35 L. Ed. 1099, 1109, 12 Sup. Ct. Rep. 308."

Appellee also charged that the City revoked its right to do business in the City of Louisville without giving it notice. What possible purpose could be subserved by giving it notice? The City had legislative power to revoke the grant or license it had given. It is the duty of the City to give the appellee ample time within which to remove its property from the streets of the City of Louisville and I have no doubt it will give a reasonable time. The City has issued no order directing the appellee to vacate the streets because it has been enjoined from issuing such an order. I have no doubt it will issue such an order unless appellee procures another franchise. Unless the order so issued gives a reasonable time then no doubt the Courts will see that appellee gets full and complete relief in this respect.

The case of Calder vs. Michigan, *supra*, is authority for the proposition that a legislative body is not required to give notice of its intention to revoke a franchise.

It is charged in the Amended Bill of Complaint that the appellant will use physical force to remove appellee's property from the streets of the City (Record, p. 79). The City in its answer (Record, p. 92), admits that it will employ the criminal and civil processes of the Courts to prevent the appellee from occupying the City's streets "unless said (appellee) complainant sees fit to acquire a franchise in the City of Louisville."

Paragraph 3 of appellant's answer sets out in detail the reasons which induced the City to revoke the appellee's rights in the streets of the City of Louisville. That paragraph of the answer concludes with the following language (Record, pp. 96-97):

> "Defendant says that it is the purpose of the General Council of the City of Louisville, and of the Mayor of the City of Louisville, to offer for sale a franchise of a nature similar to that heretofore exercised by the complainant company whenever said complainant company desires to purchase such a franchise.
>
> "Defendant says, moreover, that under the laws of the State of Kentucky, the City of Louisville can be compelled to offer for sale such franchise of a similar nature, upon the request of the complainant company."

The fact is that the appellee had for years prior to the ordinance of January, 1909, practiced the grossest kind of discrimination among its patrons in the City of Louisville. There were two telephone companies in the City of Louisville. Appellee had operated its exchange the longer of the two and had acquired the cream of the business. It had valuable long distance connections, which the other company did not have, and which, therefore, made it necessary for certain business men to subscribe to its

service. Whenever it became necessary appellee would lower its rates or give its service free in order to stifle competition.

These facts are fully sustained by the depositions of the numerous witnesses who testified for appellant, and whose testimony may be found from page 112 to page 183 inclusive of the record.

I especially call attention to the deposition of James F. Grinstead, Mayor of the City of Louisville (p. 171 to 178 of the record), and H. B. Warren the City's accountant (p. 178 to p. 183 of the record).

If any reason were required to justify the City in revoking the appellee's rights in the City of Louisville such gross discrimination as is shown by this evidence is certainly ample reason.

That a telephone company cannot be permitted to discriminate among its patrons is so well established that it scarcely needs citation of authority.

Mr. Wyman in his work on Public Service Corporations, Chapters 27 and 28, discusses the subject at great length and shows by the overwhelming weight of authority that the present-day rule is as stated above.

In the case of Delaware D. & A. Telephone Co. vs. State of Delaware, 50 Fed. Rep. 677, the Court said:

> "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment. This has been so frequently decided that the point must be regarded as settled."

In the case of State vs. Bell Telephone Company, 23 Fed. 539, Justice Brewer, for the Circuit Court, discuss-

ing the subject of the right of a telephone company to discriminate among its patrons said:

> "The telephone system is simply a system for the transmission of intelligence and news. It is perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all."

See also Cumberland Telephone Co. vs. Kelly, 160 Fed. Rep. 517.
Delaware & S. Telephone Co. vs. Delaware, 50 Fed. Rep. 677.
State of Missouri vs. Bell Telephone Co., 23 Fed. Rep. 541.
Rudd vs. New York, 143 U. S. 517.
L. & N. vs. Central Stock Yard, 97 S. W. 778.

CONCLUSION.

In conclusion I beg leave to say that in the argument of the case below no answer was made to the contentions here advanced.

Moreover, the lower Court failed to notice or discuss the points made by appellee or the authorities cited in support of those points.

In view of the points here advanced and of the authorities cited in support of those points, I respectfully submit that the appellee is, and was when the Bill of Complaint was filed, without any semblance of authority to occupy the streets of the City of Louisville; that the decree of the lower Court should be reversed; that the in-

junction granted by the lower Court should be dissolved, and that the Bill of Complaint should be ordered dismissed.

Respectfully submitted,

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Counsel for Appellant.

HUSTON QUIN,
JOSEPH S. LAWTON,
Of Counsel.

Feb. 5th, 1912.

Office Supreme Court, U. S.
FILED.
MAR 4 1912
JAMES H. McKENNEY
Clerk

No. 197.

IN THE

Supreme Court of the United States

October Term, 1911

City of Louisville, - - - - - - - - - - - *Appellant,*

v.

Cumberland Telephone & Telegraph Company, - - - - - - - - - *Appellee.*

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE

WILLIAM L. GRANBERY,
ALEXANDER POPE HUMPHREY,
ALEXANDER POPE HUMPHREY, Jr.,
Solicitors for Appellee.

John P. Morton & Company, Incorporated, Louisville, Ky.

In the Supreme Court of the United States

OCTOBER TERM, 1911

No. 197

CITY OF LOUISVILLE, - - - - - - *Appellant,*

versus

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, - - - - - *Appellee.*

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

BRIEF FOR APPELLEE.

This case involves the validity of an ordinance passed by the General Council of the city of Louisville January 23, 1909, and which is set out in full in the record, page 11, and on page 16 of appellant's brief.

This ordinance attempted to repeal an ordinance adopted by the General Council of the city of Louisville, approved August 17, 1886, and which is set out in full in the Record, pages 3, 4, and 5, and is printed in appellant's brief at pages 4 to 8. It is under this latter ordinance that the telephone exchange in the city of Louisville has been conducted since the date of its passage.

By an act of the Legislature of Kentucky, approved April 3, 1886, there was chartered a corporation under the name of The Ohio Valley Telephone Company. This act is set out in full in the Record, pages 56 and 57, and is printed in full in the appellant's brief, at pages 2 to 4. The charter gave to The Ohio Valley Telephone Company the right to construct, maintain, and operate, within the State of Kentucky and elsewhere, telephone lines, exchanges and systems, and to conduct all business incident and appurtenant thereto.

The fifth section is as follows:

> "SEC. 5. The said Company may construct, equip, and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the City of Louisville, with and by the consent of the General Council of said City; and it may purchase or lease from any corporation created under the laws of this Commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interest therein, equipment, rights of way, easements, servitudes, in the highways, streets, and alleys in the City of Louisville, together with all of its properties, and, when purchased or leased, shall have power to maintain and operate the same along, over or under the highways, streets and alleys of the City of Louisville; provided, however, that such telephone poles, lines and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said City of Louisville by the General Council thereof. And the said Company may also construct, equip and maintain telephone lines along, over or under the highways, streets and alleys, and across any water course within this Commonwealth so as not to obstruct the same; and said Company may connect its lines with those of any other Company on such terms as may be agreed on."

It was in pursuance of this charter that the city of Louisville passed the ordinance approved August 17, 1886. The title to this ordinance is as follows:

> "An ordinance confirming and ratifying Section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3d day of April, 1886, and entitled, 'An Act to incorporate The Ohio Valley Telephone Company,' and granting to the said The Ohio Valley Telephone Company the right to construct, equip, operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors and wires, and to operate its telephone lines over, along or under any highway, street or alley in the City of Louisville."

The ordinance first recites in full Section 5 of the charter of The Ohio Valley Telephone Company. It then provides as follows:

> "Therefore, be it ordained that the said act, in so far as it refers to the constructing, equipping, operating, and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating, and maintaining conduits and manholes; to laying pipes, cables, conductors, and wires, and operating telephone wires over, along, or under the highways, streets, and alleys in the city of Louisville is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said The Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate, and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate, and maintain conduits and manholes; to lay pipes, cables, conductors, and wires, and operate its telephone lines over, along, or under any street, avenue, alley, or sidewalk in the city of Louisville; provided, . . ."

Following the word "provided," the ordinance requires the Telephone Company, its successors and assigns,

to carry on its poles or through any underground system which it may construct, such wires or conductors as may be necessary for operating the fire and police systems of the city of Louisville, free of charge to said city. There also follow, in the second, third, fourth, fifth, and sixth clauses of the contract, regulations governing the company in constructing its underground system, and the avoidance of any injury to streets, sewers, water pipes, or gas pipes, and the restoration of public ways which have been opened in order to construct such underground system, and the indemnity against any liability which the city may incur on account of such work being done in a negligent way.

By the seventh clause of the ordinance it is provided that the Telephone Company is to execute a bond in the sum of fifty thousand dollars, with good and sufficient security, conditioned to hold the city of Louisville harmless and free from all such damage as is above referred to.

The eighth and ninth clauses of the ordinance are as follows:

> "Eighth: Nothing in this ordinance shall be construed as to give to said Telephone Company, its successors or assigns, any exclusive right to erect poles or to lay underground conduits, pipes, cables, conductors, or wires in the streets, avenues, alleys, or sidewalks of the city of Louisville.
>
> "Ninth: That (within thirty days from the passage of this ordinance) the said The Ohio Valley Telephone Company, its successors or assigns, shall formally agree, in writing, to accept the terms of the provisions of this ordinance, and file the said written copy of said agreement and also the aforementioned bond with the Mayor of the city of Louisville, and from and after the date of said acceptance this said ordinance shall take effect and be in force as a contract between the said city of Louisville and the said The Ohio Valley Telephone Company.
>
> "Approved August 17, 1886."

Thereafter, on September 3, 1886 (R. 8), the Telephone Company formally notified the City of its acceptance of the terms of the ordinance and transmitted a bond in the penalty of fifty thousand dollars, with surety. This acceptance and the delivery of the bond were acknowledged by the Mayor on September 4, 1886 (R. 10). From that time continuously to January 27, 1900, The Ohio Valley Telephone Company operated a telephone exchange in the City of Louisville, occupying the streets, alleys, and public places with its poles, wires, cables, conduits and other apparatus.

On that date (January 27, 1900), The Ohio Valley Telephone Company and the Cumberland Telephone and Telegraph Company entered into articles of consolidation under the Kentucky Statutes.

On April 7, 1902, the city of Louisville passed an ordinance requiring the new company to execute a bond as required by the ordinance relating to the rights and duties of The Ohio Valley Telephone Company, and pursuant to such ordinance the present appellee did execute this bond, which was duly accepted by the General Council of the city of Louisville, and the old bond was declared released (R. 9 and 10).

From that date to the present the Cumberland Telephone and Telegraph Company (for brevity hereinafter called the Telephone Company) has continued to conduct a telephone exchange in the city of Louisville, occupying the streets, alleys, and public places with its poles, wires, cables, conduits, and other apparatus, and without objection on the part of the city of Louisville or any of its authorities, until January 22, 1909, when the repealing ordinance to which we have heretofore referred was adopted.

Omitting the title this ordinance is as follows:

> "Be it ordained by the General Council of the city of Louisville:
>
> "Section 1. That an ordinance entitled 'An ordinance confirming and ratifying section 5 of an act passed by the General Assembly of the Commonwealth of Kentucky, and approved on the 3rd day of April, 1886, and entitled "An Act to incorporate The Ohio Valley Telephone Company," and granting to the said The Ohio Valley Telephone Company the right to construct, equip, and operate and maintain telephone systems and exchanges, and to erect poles and string wires thereon; to construct, operate and maintain conduits and manholes; to lay pipes, cables, conductors, and wires; to operate its telephone lines over, along or under any highway, street or alley in the city of Louisville,'—approved August 17, 1886, be, and the same is, hereby repealed.
>
> "SEC. 2. This ordinance shall take effect from and after its passage."

By virtue of this repealing ordinance the city of Louisville claimed that the Cumberland Telephone Company was no longer in lawful occupancy of the streets of the City of Louisville, and threatened to cause such occupation to cease by putting in force such civil and criminal remedies as could be used for that purpose.

Thereupon a bill in equity was filed by the Telephone Company in the United States Circuit Court for the Western District of Kentucky against the city of Louisville, setting out its rights in the premises and claiming protection of the court against the threatened unlawful conduct of the city of Louisville made party defendant thereto. A temporary injunction was granted and after answer filed and proof taken this injunction was made permanent. The ground of relief was that the repealing ordinance violated the obligation of a contract and that

the city was about to deprive the complainant of its property without due process of law.

The propriety of such a bill and the prayer for relief is fully explained and justified by the citation of numerous authorities in an opinion of the Circuit Court of Appeals for the Sixth Circuit, entitled Iron Mountain Railroad v. City of Memphis, 96 F. R., 113.

We will not attempt to follow the appellant through all the contentions made in the brief on file, as we believe that a statement of the principles of law to be here applied is all that is necessary to put the Court in possession of our side of the argument.

It is to be noted that the grant to The Ohio Valley Telephone Company ran to that company, its successors and assigns. There can be no doubt that under the law of the State of Kentucky the consolidated corporation (the Cumberland Telephone Company) is, if not the successor, at least the assignee of each of its constituent companies.

I.

POWER OF THE CITY.

Much space is given in the brief of appellant to the proposition that a municipality cannot make to a public utility company a grant of the right to use its streets without legislative authority. But these cases are all answered by the express terms of the charter of The Ohio Valley Telephone Company; and it would hardly seem necessary to discuss them further.

In the year 1891 the State of Kentucky adopted its present Constitution. It will not, we believe, be disputed that prior thereto the following extract from Dil-

lon's Municipal Corporations, given in Iron Mountain Company v. City of Memphis, 96 F. R., 120, states the law accurately as to the State of Kentucky.

> "Public streets, squares, and commons, unless there be some special restriction, when the same are dedicated or acquired, are for the public use; and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. 'To the commonwealth here,' says Chief Justice Gibson, 'as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions,' "—citing O'Connor v. Pittsburgh, 18 Pa. St. 187.

That the Legislature had the right, prior to the adoption of the present Constitution of Kentucky, to grant to The Ohio Valley Telephone Company its charter, including Section 5 thereof, and to grant to the city of Louisville the power therein conferred upon it, would seem to us to be too plain for dispute.

By the terms of the ordinance as given above no exclusive right was granted. Upon the contrary, the ordinance expressly provided that the right therein granted should not be exclusive. All authorities, therefore, cited in the brief to the effect that an exclusive grant made by a city is beyond its authority, are beside the mark.

II.

THE NATURE OF THE GRANT.

The right acquired by The Ohio Valley Telephone Company, under the ordinance above quoted, has been often defined. We select two cases characterizing the nature of the right.

In the case of Board of Mayor, etc., vs. East Tennessee Telephone Co., 115 Fed. 304, the Court of Appeals for the Sixth Circuit said:

> "Consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system, was the grant of an easement in the streets and the conveyance of an estate or property interest which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or invoke was reserved. This principle has too many times been declared and applied by this court to require further elaboration. Detroit Citizens St. Ry. Co. v. City of Detroit, 12 C. C. A. 365, 64 Fed. 628, 26 L. R. A. 667; Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296; Iron Mountain R. Co. v. City of Memphis, 37 C. C. A. 416, 96 Fed. 113; Citizens' Ry. Co. v. Africa, 23 C. C. A. 252, 77 Fed. 501."

In Walla Walla v. Water Co., 172 U. S. 9, this court says:

> "But it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants, through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public

service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it." Citing New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 660; New Orleans Water Works Co. v. Rivers, 115 U. S. 674; St. Tammany Water Works v. New Orleans, 120 U. S. 64; Crescent City Gas Co. v. New Orleans Gas Co., 27 La. Ann. 147.

Perhaps the fullest discussion of the character of such a right as this is contained in the case of People of the State of New York v. O'Brien, 111 N. Y., 1; S. C., 2 L. R. A. 255, where numerous authorities are cited. It there appears, as it also clearly appears from the other cases which we have cited, that a grant of this character is an easement in the streets and as much property as any other estate, real or personal, which can be acquired by an individual or a corporation. This case has been cited with approval by the Federal courts, as in Detroit Citizens Street Railway v. City of Detroit, 12 C. C. A. 365; S. C., 64 F. R. 628, and Detroit v. Detroit Citizens Street Railway, 184 U. S. 395.

The authorities cited in the New York case are not only decisions of the highest courts of the State but of this court.

Such a property right is vendible; passes to the successor in consolidation; can be mortgaged, sold under judicial process; and is as separate and apart from the mere life of the corporation—its power to be—as is any other property which it may acquire. The title to such an easement is in no way measured by or dependent upon the life of the corporation; can exist beyond it and apart from it. Detroit v. Detroit Citizens Co., 184 U. S. 394.

III.

THE EFFECT OF THE CONSTITUTION OF 1891 UPON THIS EASEMENT.

Appellant endeavors to show that this easement was somehow affected by the adoption in Kentucky of the Constitution of 1891, and of certain statutes enacted in pursuance thereof. We find it difficult to take hold of this argument. If this easement existed prior to the adoption of the Constitution of 1891 as a property right, or under the sanction of a contract, such property right could no more be taken away nor such contract violated by the adoption of a new constitution in Kentucky, than by the passage of an act of its Legislature or an ordinance of the General Council of the city of Louisville. But the fact is no such wrong was attempted.

Undoubtedly this new Constitution of Kentucky was designed to curtail the power of the Legislature over municipal highways, and to provide how rights could be acquired in such highways under city authority. In this view Sections 163 and 164 of the Constitution were framed. They are as follows:

> "SEC. 163. No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

> "SEC. 164. No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

It will be observed that the first of these sections is negative in character; the second, though somewhat negative in form, affirmative in its result. The first section prohibits the Legislature from granting any rights in the streets of a city for the purpose of being used by the public utility companies therein mentioned, except upon the assent of the city. Section 164 defines how the city can give to certain public utility companies the right to occupy its streets. But it will be observed that Section 163, after providing that none of the companies named shall be permitted or authorized to use the streets of the city without the consent of the city, concludes as follows:

> "But when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

There can be no doubt that a charter had been granted to The Ohio Valley Telephone Company prior to the adoption of the Constitution, and that work had been begun under the terms and provisions of that charter. This would seem to be too plain to need argument; but the Court of Appeals of Kentucky has given a positive construction to this language. The matter came up in

the case of City of Louisville v. Louisville Water Company, 105 Ky., 754. In that case the Louisville Water Company, which had been chartered many years before the adoption of the Constitution of 1891, was proceeding, since that date, to continue to open the streets of the city of Louisville for the purpose of laying down its mains. Its right to do this without the assent of the Board of Public Works (the municipal authority controlling the use of streets) was challenged upon various grounds: first, that under a proper construction of its charter it never had the right; second, that if it ever had the right this had been taken away from it by Section 163 of the Constitution. Upon this latter point the court said:

> "It remains to determine whether this provision of appellee's charter is still in force. It is insisted that it is in conflict with Section 163 of the Constitution. So far as it is material to this controversy, that section is as follows: 'No . . . water . . . company within a city or town shall be permitted or authorized to . . . lay its pipes or mains . . along, over, under or across the streets, alleys or public grounds of a city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights and work in good faith has begun thereunder, the provisions of this section shall not apply.'
>
> "The language of this provision plainly limits its application to future grants, and excludes old grants from its operation. The words 'no water company . . . . shall be permitted or authorized to lay,' etc., necessarily refer to authority not already granted, but to be granted in the future. If there is any doubt of this, the last clause of the section puts the matter beyond question, providing that it shall not apply to charters theretofore granted where work in good faith had been begun under them. When this Constitution was made, appellee

> had for many years been supplying the city of Louisville with water under this charter, laying its mains in the streets without the consent of the boards of the city being first obtained. The section seems to have been designed to prevent this grant of power for the future, but to have expressly excepted from its operation rights theretofore acquired where work had been in good faith begun under the grants."

This would seem to dispose of the contention based upon Section 163 of the Constitution.

IV.

EFFECT OF LEGISLATION SINCE THE CONSTITUTION OF 1891 UPON THIS EASEMENT.

Prior to the adoption of the present Constitution of Kentucky the Legislature had full power to pass special as well as general laws. The Constitution of 1891 endeavored to restrict this within the smallest possible compass. It therefore provided, among other things, that the Legislature should not, by special act, incorporate any company. Thereupon the first Legislature which met after the adoption of the Constitution passed a general law providing for the organization of every character of corporation which it should be lawful to organize. As may be supposed, however, there were at that time many corporations conducting a similar business but upon which had been conferred, by special charters, divers powers. It was deemed expedient to bring all corporations of the State of the same kind into unison, so that when it became pertinent to consider the power of a particular corporation it should not be necessary to look into what powers had been granted to it by its special charter, but to consider only what powers it could have

if organized presently. As a sort of Procrustean bed, therefore, the Legislature put into the general incorporation law the following section:

> "Sec. 573. The provisions of all charters and of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers, or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager, or agent so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

It does not seem to us to be at all difficult to determine the scope or effect of this provision. It has nothing whatever to do with the property owned by a particular corporation on the date named in the section—September 28, 1897. It is impossible to conceive what confusion and wrong would result from holding that this section *uno ictu* took away all rights which had been acquired by various public utility companies in the high-

ways or public places of the State. We are speaking within bounds when we say it would have reduced to bankruptcy every public utility company in the State unless, of course, the municipalities had come to the rescue by selling new franchises. But there was no obligation upon the municipalities to do this, and therefore these companies, in which had been invested millions of dollars, would have suddenly come under the mercy of the municipal corporation in which they were situated.

There is absolutely no authority in the State of Kentucky for any such construction of this provision of the Statute; and, as stated above, if the Statute were to be so construed it would be in violation of the Fourteenth Amendment, and, where agreements have been made, in violation of the Constitution of the United States prohibiting the impairment of the obligation of a contract.

V.

EFFECT ON EASEMENT BY THE GRANTING OF NEW FORM OF GOVERNMENT TO CITY OF LOUISVILLE.

It is claimed that under Blair v. Chicago, 201 U. S., 485, the easement granted to the Cumberland Telephone Company had expired because, it is said, the charter of the city of Louisville had expired.

The Constitution of 1891 provided by Section 156 that cities and towns of the Commonwealth, for the purpose of their organization and government, should be divided into six classes, and that the organization and

powers of each class should be defined and provided for by general laws; that to the first class should belong cities of one hundred thousand population or more. Carrying out this provision, the Legislature of Kentucky adopted the Act of July 1, 1893 (Ky. Stat., Section 2742). The city of Louisville is the only city in Kentucky of the first class. The above section provided:

> "That the inhabitants of cities of the first class are hereby continued corporate by the name and style which they now bear, with power to govern themselves by such ordinances or resolutions for municipal purposes as they may deem proper."

Similar language was used in Section 3038 as to the cities of Covington, Newport, and Lexington, thus:

> "The cities of Covington, Newport, and Lexington are hereby declared to be cities of the second class, and the inhabitants thereof and of such other cities as may hereafter be declared cities of the second class respectively, are created and continued bodies corporate and politic within their respective limits."

The cases cited by appellant—Parsons v. Breed, 126 Ky., 765, and City of Louisville v. Vreeland, 140 Ky., 404, simply refer to the fact that the city of Louisville has a new government. If giving to the city of Louisville a new form of government caused the city of Louisville to expire, then it would seem that when Kentucky adopted the new Constitution in 1891 the State of Kentucky expired and an entirely new State was created. If that is the case one would think there should be an early application to Congress to admit this new State.

VI.

THE CONSIDERATION FOR THE GRANT OF THE EASEMENT.

It is insisted that there was no consideration for the grant of this easement to The Ohio Valley Telephone Company.

The amended bill of the complainant (R. 78) avers:

> "Moreover, in strict accordance with the terms of said contract between the defendant, the city of Louisville and said The Ohio Valley Telephone Company, it has carried and does now carry upon its poles and in its underground conduits fire alarm and police wires of the defendant city, free of charge to said city, which said wires have been and are now daily used by said city in the conduct of its fire and police departments."

This allegation is, of course, in pursuance of the first section of the ordinance of the city of Louisville, approved August 17, 1886, wherein this service is required of The Ohio Valley Telephone Company.

The defendant, answering this amended bill (R. 99), says:

> "Defendant admits that the complainant carries on its poles and in its underground conduits fire alarm and police wires of the defendant, free of charge; but denies that the same is done under any contract between the city of Louisville and The Ohio Valley Telephone Company; and defendant will remove its wires from the property of the complainant whenever requested so to do."

In view of these statements it is difficult to understand the following paragraph in the brief of the appellant on page 84:

> "In the second place, no consideration for the making of such a contract passed from the Telephone Company to the city. The right to use the telephone poles for the city's fire alarm system was never taken advantage of by the city. The appellee did not in its bill of complaint, nor in its proof, lay any claim to this clause of the ordinance as a consideration to support the contract in question."

But again, on this matter of consideration—in City Railway Co. v. Citizens' Railroad Co., 166 U. S., 557, it appeared that after a corporation had built its railroad in the city of Indianapolis under a grant allowing it to occupy the streets for a particular length of time, an ordinance was passed extending this period of occupancy. It was in that case insisted that this ordinance was without consideration. After adverting to certain other circumstances, this court said:

> "But however this may be, it seems to us that the continued operation of the road may itself be regarded a sufficient consideration for the extension of the franchise. This extension was not a mere gratuity or bounty within the case of Grand Lodge v. City of New Orleans, 166 U. S. 143, recently decided, but was an agreement to prolong the privilege of occupying the streets of the city, in consideration that the company should continue the facilities already afforded to its citizens. The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the

company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case the consideration, viz., the continued operation of the road, is the same. If, instead of extending the original ordinance, this ordinance had been surrendered by the company, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be a sufficient consideration for the new ordinance. This was, in reality, part of the consideration upon which the original franchise was granted, and is, we think, a valuable consideration within the meaning of the law, and sufficient to support the extension."

It appears without contradiction that this company has, since the ordinance granting the easement was passed, expended more than one million, seven hundred thousand dollars in building up its exchange in the city of Louisville. Under these circumstances it would be difficult to find a case in which there had been a consideration more certain and valuable passing from a public utility company to the community which granted to it facilities for the conduct of a business essential to the needs and conveniences of that community.

VII.

RESERVATION OF RIGHT TO REPEAL CHARTER OF APPELLEE.

On page 9 of appellant's brief is given an Act of the Legislature of Kentucky formerly known as the Act of 1856. This act was passed for the purpose of avoiding the effect of the Dartmouth College case, by reserving to the Legislature the right to repeal charters of corporations. It is difficult to know whether the appellant relies in any way upon this Act. The charter of The Ohio Valley Telephone Company has never been repealed nor has there ever been any effort to repeal the charter of the Consolidated Company.

Section 1 of the Act of 1856 reads as follows:

> "Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky: That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

If we have failed to show that the appellee has an easement in the streets of the city of Louisville our case falls to the ground. If we have showed that it has such easement, then it is obvious that it is a right which has become vested, and is not subject to be taken away by any legislative act. This construction is fortified, if it

were necessary, by the next section of the Act of 1856, which provides:

> "Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid."

It will thus be seen that, by the express language of the Kentucky statute, on repeal of its charter the property of the corporation belongs to its stockholders. This is the result arrived at by construction of the New York statute in People vs. O'Brien above cited.

VIII.

SUMMARY OF CASE FOR APPELLEE.

It will appear from the foregoing that in a charter granted to The Ohio Valley Telephone Company, without limit as to time, there is expressly granted the power to the city of Louisville to pass an ordinance and to enter into a contract for the use by the corporation of its streets; that this consent was given and contract made; that it has been acted upon for more than twenty-five years; that in the meantime large sums of money have been spent upon the property; that this grant ran to The Ohio Valley Telephone Company, its successors and assigns; that upon the consolidation of that company with the Cumberland Telephone and Telegraph Company, under the law of the State of Kentucky, all property of each

constituent company passed to the Consolidated Company; that the Cumberland Telephone Company was recognized by the city of Louisville as the owner of this easement subsequent to such consolidation, and required, in pursuance of the terms of the ordinance granting it, to execute the bond therein provided for; that the city of Louisville and its citizens have enjoyed the consideration provided for in the ordinance from the time of its passage down to date; that there has been no cessation of the existence of the city of Louisville but only a change in its form of government; that property rights vested in a corporation were saved from the repealing power of the Legislature under the Act of 1856, and that an easement of this character was expressly saved to the owner thereof by Section 163 of the new Constitution; that this easement is of a character which is entirely independent of corporate life and would exist as property even if the corporation should cease to exist, and is as much a property in fee as any other real or personal property which the company has acquired or may hereafter acquire.

The authorities upon this last proposition are, we think, full and decisive.

People v. O'Brien, 111 N. Y., 1.

We quote the following, approving this case, from Detroit v. Detroit Citizens Street R. Co., 184 U. S., 395:

> "We see no reason why the company could not take the extended term as provided for in the ordinance, and it formed a good consideration for the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in Detroit Citizens' Street Railway Company & Others

v. City of Detroit, 12 C. C. A. 365; same case 64 Fed. Rep. 628. In the course of the opinion of the court in that case, the cases of People v. O'Brien, 111 N. Y. 1, and Miner v. New York Central Railroad Company, 123 N. Y. 242, were cited. People v. O'Brien is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such rights. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee."

In the case of Trustees of Southampton v. Jessup, 162 N. Y. 122, 56 N. E. 538, it appeared that Jessup had been granted by *resolution* of the Trustees of the town the right to erect a bridge. The resolution conferring this right was as follows:

"Resolved, that Nathan Jessup be, and is hereby, given liberty to make a roadway and to erect a bridge across the Great South Bay, commencing at the south point of Potunk Neck; thence running southerly to the beach; the said bridge to be a drawbridge, of a width of not less than twenty feet, the height above the meadow three feet, and the draw to be twenty feet wide; and the said Nathan C. Jessup shall not cause any unnecessary delay to those navigating the waters of said bay."

The legislative authority of the Trustees to grant this privilege had been decided in the case of People v. Jessup, 160 N. Y. 249, and after referring to that case, Judge Vann said:

> "Neither party challenges that decision, but both recognize it as sound law, so that no question now arises as to the power of the plaintiffs in the premises. They differ, however, as to the meaning and effect of the resolution; the plaintiffs claiming that it is a mere license, revocable at will, while the defendant insists that it is a franchise or easement, or, if a license, irrevocable after he had acted upon it at a large expense. A license is a personal, revocable, and nonassignable privilege, given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. (Greenwood L. & P. J. R. Co. v. New York & G. L. R. Co., 134 N. Y. 435, 440, 31 N. E. 874, and cases cited.) 'Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee.' (*Id.*) An easement is a permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former, and a burden upon the land of the latter, is not inconsistent with general ownership. (Railroad Co. v. Garvey, 159 N. Y. 334, 338, 54 N. E. 60, and cases cited.) A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act or a series of acts of public concern; and, when accepted, it becomes a contract, and is irrevocable, unless the right to revoke is expressly reserved. (People v. Utica Ins. Co., 16 Johns. 358, 387; Bank v. Earle, 13 Pet. 519, 595, 10 L. Ed. 274; California v. California Pac. R. Co., 127 U. S. 1, 40, 8 Sup. Ct. 1073, 32 L. Ed. 150.) These definitions, while not comprehensive enough to cover all cases, are sufficient for the case in hand.
>
> "The right in question is not a license, because it is neither temporary nor personal, as the drawbridge and roadway authorized are substantial, fixed,

and permanent improvements for the benefit of defendant's lands, and assignable therewith. It would fall under the definition of an easement if it had been granted by an ordinary landowner, and not by a body holding lands under water in trust for the public. We think it is a franchise, because it was granted in the exercise of a governmental power conferred by royal charter in colonial days. (People v. Jessup, *supra.*) It is a special privilege, because it is not of common right; is permanent, because there is no limitation as to time; and is of public concern, because it relates to the public domain. A roadway necessarily includes a right of way, which, when granted by a legislative body, is a franchise. The resolution has the same effect as if a like privilege had been granted by act of the legislature in relation to similar lands held by the State for public use. A grant by resolution of a legislative body is as effective as a grant by deed of an executive body, and is the usual form in which franchises are conferred."

In the case of Town of Arcata v. The Arcata & M. R. R. Co., 92 Cal. 639, the Board of Trustees of the town of Arcata had given the railroad company the privilege of laying its tracks on the street, and subsequently revoked the privilege or license given and instituted proceedings in ejectment.

The facts are stated in the opinion as follows:

"In March, 1885, the defendant applied to plaintiff's Board of Trustees for the privilege of constructing and operating a side track between certain points within the town limits, and an order was made by the Board granting to defendant 'the right to lay and maintain a side track from Dean and Campbell's switch across Seventh Street to and down J. Street to Tenth Street,' etc. * * * On August 8, 1888, the Board of Trustees passed an order—of which defendant had notice before the work was completed—rescinding the order of March 9, 1885, granting defendant the privilege of constructing a side track, etc."

It appeared that the railroad had acted under the privilege given by this order and constructed the switch, and it was held that the privilege given could not then be revoked. The court said:

> "There is no merit in the contention that the order of March 9, 1885, was a mere license, revocable at the pleasure of the Board. After the defendant had acted upon the terms of the order and expended money in the construction of the road, the Board could not rescind or recall the privilege it had granted, unless the company failed to comply with the terms or conditions of the grant."

In the case of People v. Central Union Telephone Company, 192 Ill. 307, 61 N. E. 428, the telephone company had been granted the privilege of using the streets for its poles, wires, etc. In construing this license, after it had been accepted and acted upon, the court said:

> "It is true, as said by counsel for the relator, that the grant by the city of Pontiac of the right to use the streets, etc., is not a franchise, but a license or contract; but it is equally clear that when the corporation accepted the privileges and entered upon the right to use the streets, etc., it became a binding contract between the city and company, which could not be revoked or rescinded except for cause. (Chicago Municipal Gaslight Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; Chicago City R'y Co. v. People, 73 Ill. 541; City of Belleville v. Citizens' Horse R'y Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.)"

In the case of Hudson Telephone Company v. Jersey City, 49 N. J. Law, 303, a telephone company had been

given permission by the common council of a city to erect its poles on certain streets. Subsequently the city passed another ordinance revoking the privilege. It was held that the last ordinance was void. The court said:

> "It appears from the evidence taken in the case that the company proceeded to place poles along the route marked out by the ordinance. They had placed from thirty-five to forty-five poles, at an expense of about $10.00 a pole, and had expended other moneys in and above the erection of the poles. Then was passed the ordinance brought up before us, which repeals the ordinance which confers permission to place the poles as above mentioned. I am of the opinion that as a general rule a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they can not be stripped by a subsequent revocation of such designation.
>
> "The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting poles and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment. * * * The power to repeal the present ordinance is also claimed to exist under the authority over streets, as well as the power to repeal ordinances, conferred upon the common council of Jersey City by its charter. But it is clear that the power to remove obstructions from streets is confined to nuisances, and any object which has a legal right upon the street is beyond the power of the common council. So long as the company violates no reasonable regulation of the common council, their property has as much right in the streets as vehicles and street cars."

IX.

THE REASON FOR THE ATTEMPTED REPEAL.

In the brief of the appellant, as well as in its answer, it is stated that the city of Louisville's attempt to deprive the appellee of its easement in the streets, and thereby to put it out of business, was because it had discriminated between its patrons; but only a slight examination of this record is necessary to show what was the real reason.

The answer of the city avers that appellee's contract right was repealed because of (1) discrimination among its patrons, (2) arbitrary conduct, and (3) extortionate rates. This answer was not sworn to, and the evidence does not sustain any one of the three causes assigned in the answer.

The *real reason* for the attempted repeal was this: In 1902 the city allowed *another* telephone company to establish a competing telephone plant in the city, and this resulted in much dissatisfaction. In December, 1908, Judge Richards, who had just retired as City Attorney, and who presented the matter to the Council Committee having the repealing ordinance under consideration, said:

> "There was a time when the General Council of the city of Louisville and a large number of our people thought it was to the interest of the taxpayers and of the public generally to have two telephone systems in the city of Louisville. The General Council of the city of Louisville was persuaded that by selling a franchise at a very low rate for monthly charges the new company would absorb all of the business of the old, and in that way we would have virtually a new system at a lower rate. But they have been disappointed. The new company was

created; it has a very large number of subscribers—somewhere between eight and ten thousand subscribers—but still the old company has grown also. It has increased its list of subscribers. It has possibly somewhere between ten and eleven thousand subscribers in the city of Louisville. Now, the result is, that every man who does a large business—whether it is a corporation business, a mercantile business, or a professional business—is compelled to have on his desk both telephones, and instead of paying for one telephone system, he is to-day paying for two, and it has become such a burden upon our people that the Mayor can scarcely walk your streets without being importuned to do something to relieve the situation. If it is in the power of the General Council of the city of Louisville to do it, the people have a right to demand at your hands that you shall relieve them of this burden. Of the seventeen or eighteen thousand subscribers to the telephones in the city of Louisville I should think that it would be reasonable to assume that at least five thousand of them subscribe to this dual system. We might say that if they pay an average of $4.00 for each unnecessary telephone, it makes $20,000.00 a month, or $240,000.00 a year, that the people of Louisville are paying for an unnecessary service. It is to relieve our people of the burden which, if it can be done, should be done.

"Now, I know it may work a hardship upon one or the other of these companies. I know that it is a hardship, but can the city of Louisville afford to say that our people shall be taxed from $100,000 to $300,000 a year when there is a legal way to relieve them of the burden, if there be a legal way?" (R. 122.)

This statement was made in connection with *another* ordinance creating a comprehensive telephone franchise, prepared and introduced in December, 1908, at the instance of the Mayor. It contained a section (16) repealing the contract with appellee. Upon ascertaining that appellee would not become a bidder for the proposed franchise, the Mayor had the ordinance withdrawn, and

submitted for passage an ordinance in terms repealing appellee's contract right, which is the ordinance now complained of in this suit. The Mayor, in a message to the Council accompanying the repealing ordinance, said:

> "As to the repealing ordinance, it may be said that it is unjust to the Cumberland Telephone Company to repeal the ordinance under which it obtained its right to do business in the city of Louisville, and not at the same time pass an ordinance authorizing the sale of a similar right or franchise, in order that the Cumberland Telephone Company might have an opportunity to purchase such a similar right or franchise.
>
> "In answer to this contention, I have to say that an ordinance repealing the ordinance which granted to the Cumberland Telephone Company its right to do business in the city of Louisville, and at the same time ordering the sale of a similar right or franchise was introduced in the lower board of the General Council, but while that ordinance was pending, and before it was put upon its final passage, the Cumberland Telephone Company, through its president, and through its attorneys, at a public meeting held by the General Council for the purpose of considering the ordinance in question, stated unequivocally that it would under no circumstances bid for such a franchise, and that the Cumberland Telephone Company did not care to purchase any similar franchise at this time. It, therefore, seems to me that there is no occasion to pass an ordinance authorizing the sale of such a franchise until it is determined that the city has a right to repeal the ordinance under which the Cumberland is now acting, and I take it for granted that the General Council would at the proper time, upon the request of the Cumberland Telephone Company, offer for sale a franchise which would be fair and just to the Cumberland Telephone Company and its patrons."

Although the answer of the city avers that arbitrary conduct, extortionate rates and discrimination were the

causes for the repeal of appellee's right to conduct its business in Louisville, yet it proceeds to say:

> "Defendant says that it is the purpose of the General Council of the city of Louisville, and of the Mayor of the city of Louisville, to offer for sale a franchise of a nature similar to that heretofore exercised by the complainant company whenever said complainant company desires to purchase such a franchise.
>
> "Defendant says, moreover, that under the laws of the State of Kentucky the city of Louisville can be compelled to offer for sale such franchise of a similar nature, upon the request of the complainant company."

The dissatisfaction of the Louisville public with a dual telephone service, and a desire to be rid of a dual service, was the *real* purpose of the Mayor. It was *not* arbitrary conduct, extortion or discrimination. It was dual service. The other telephone company in Louisville so understood the Mayor's purpose, and he has never denied it. The other company in speaking of the ordinance of December, 1908, says:

> "But in the meantime, while this ordinance just mentioned was before the courts, the Mayor started out on his own initiative to solve the telephone problem. He had the City Attorney (Judge A. E. Richards) to prepare an ordinance for the sale of a telephone franchise. His avowed purpose at that time was to secure but one telephone system in the city of Louisville. As there were then two telephone plants in the city (in each of which very large capital had been invested), and as the constitution of the State positively prohibits any kind of combination between competing telephone companies, the Mayor's purpose was to absolutely destroy one or the other of these costly plants, and thus to destroy an investment in the city of Louisville, in either case, of over $1,500,000." (R. 108.)

As indicating the temper of the city of Louisville towards the appellee we make the following extract from the deposition of Mr. Caldwell, the President of the Cumberland Telephone Company. Mr. Caldwell is speaking of a meeting in which this telephone question was being considered at the time that this ordinance proposing to sell one franchise was under consideration. We copy from the record, beginning at page 123, running down to page 125.

"Q. At that same meeting was that company represented?

"A. It was, by Mr. Helm Bruce.

"Q. What position did he occupy?

"A. He was Vice-President, I understand, and a Director at any rate, and general counsel for that company.

"Q. What did he have to say on that occasion, with respect to his company and its rates?

"(Objected to by defendant.)

"A. Mr. Helm Bruce said: 'The Home Telephone Company is interested in having a franchise, a right to operate in the city of Louisville upon terms upon which it can live and make reasonable profits for its owners. * * * It came here some years ago—seven now, I believe—and acquired a franchise to operate a telephone system. At that time, having had no great experience in the matter, it believed the rates, conditions and terms fixed in that franchise were reasonable, and that it could live and prosper under the same. It, therefore, bought the franchise and gave $10,000 for it. Experience has simply demonstrated its mistake. That is the whole story, told right there. Judge Richards said very truly a moment ago that the representatives of the Home Telephone Company had said to the Council, and I was one of them, that under the rates of the present Home Telephone franchise, by which I mean that which was sold in 1901, the Home Telephone Company could not live. I said, and I say again, that under these rates the Home Telephone Company cannot live and keep up its plant. It may live and pay

interest on its bonds by letting its plant go to rack, but it cannot keep up its plant and make the extensions that are yearly required under the present rates. To continue in the city of Louisville it must have a right to charge higher rates than fixed in the old franchise. In that old franchise the idea seemed to exist that the telephone company could do business under any restrictions, that it was kind of an inexhaustible gold mine. That is not true. * * * Of course, the question of rates, so far as the Home Telephone Company was concerned, was the most material. I do not think the rates put in the original ordinance namely $6.00 for the first half and $7.00 for the last, was fair. I have heretofore insisted, and I say now, that nothing less than $7.00 per month as an average rate for the twenty years to come would be fair. I have sat in the Board of Directors of the Home Telephone Company, operating under the present rate, and I know from experience that they are not living rates. I have also seen this matter come up on the passage of a new ordinance for the sale of a new franchise and gone into the question of rates as far as I, with my knowledge, am capable of doing, and I have enough to satisfy myself that a telephone company cannot, in the city of Louisville, and with the character of plant required, maintain its plant and make a fair living profit for its investment at less than $7.00 per month. I do not believe it can be done; I have taken the figures, the actual cash, aside from watered stocks and bonds, the actual investment and the cost of operating, and come to a conclusion as best I can, and, dividing the rates between the different classes of service, such as party lines and single lines and residence lines and business lines, and that is the conclusion I have reached after most deliberate investigation.

"'Now, the amendment as it is fixed here, amounts practically to an average of $7.00 per month; it is $6.00 per month for the first third, $7.00 for the second third, and as to the last third, it will be left to arbitration, not to exceed $8.00 per month. Then, if the last one-third should be $8.00, it will be $6.00, $7.00, and $8.00, which makes practically an average $7.00 rate, and I will say that that is fair, but I am absolutely sure that nothing less than that would be fair.'

"Q. What kind of a man is Mr. Helm Bruce, as to intelligence and standing?

"A. I understand he is one of the most prominent and reliable and intelligent men in Louisville: one of the most prominent citizens.

"Q. Is he a man of high character?

"A. Yes, a man of the highest character.

"Q. And a man that stands at the top of his profession, the legal profession?

"A. My understanding is, that he stands at the top of the legal profession there.

"Q. You were present and heard what Judge Richards and Mr. Bruce said?

"A. Yes, I heard every word of it."

And yet the Council not only passed the repealing ordinance, but also an ordinance reducing the rates of the appellee far below those proposed to be fixed by the ordinance which was expected to result in having only one telephone system.

It is, therefore, insisted that from this record it is manifest that the General Council of the city of Louisville attempted to repeal appellee's right to conduct a telephone business in order to destroy dual telephone service, and not because of any supposed arbitrary conduct, extortion or discrimination. But whatever may have been the motive or purpose actuating the city authorities, they were without authority or power to destroy the vested rights of appellee to conduct a telephone business in the city of Louisville, because of the constitutional provision against the impairment of the obligation of contracts, and against the taking of property without due process of law.

Respectfully submitted,

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ALEXANDER POPE HUMPHREY,
ALEXANDER POPE HUMPHREY, JR.
Solicitors for Appellee.

POINTS AND AUTHORITIES.

I.

POWER OF THE CITY.

Iron Mountain Company v. City of Memphis, 96 F. R., 120.

II.

THE NATURE OF THE GRANT.

Board of Mayor, &c. v. East Tennessee Telephone Co., 115 F. R., 304; Walla Walla v. Water Co., 172 U. S., 9; People of the State of New York v. O'Brien, 111 N. Y., 1, 2 L. R. A., 255; Detroit Citizens Street Railway v. City of Detroit, 12 C. C. A., 365, 64 F. R., 628; Detroit v. Detroit Citizens Street Railway, 184 U. S., 395.

III.

THE EFFECT OF THE CONSTITUTION OF 1891 UPON EASEMENT.

Constitution of Kentucky, Secs. 163 and 164.

City of Louisville v. Louisville Water Co., 105 Ky., 754.

IV.

EFFECT OF LEGISLATION SINCE THE CONSTITUTION OF 1891 UPON EASEMENT.

Kentucky Statutes, Section 573.

Parsons vs. Breed, 126 Ky., 765; City of Louisville vs. Vreeland, 140 Ky., 404.

V.

EFFECT ON EASEMENT BY THE GRANTING OF NEW FORM OF GOVERNMENT TO CITY OF LOUISVILLE.

Constitution of Kentucky, Section 153; Kentucky Stat., Sections 2742, 3038.

VI.

THE CONSIDERATION FOR THE GRANT OF THE EASEMENT.

City Railway Co. v. Citizens Railroad Co., 166 U. S., 567.

VII.

RESERVATION OF RIGHT TO REPEAL CHARTER OF APPELLEE.

Acts, Ky. Legislature, 1856; People of the State of New York v. O'Brien, 111 N. Y., 1, 2 L. R. A., 255.

VIII.

SUMMARY OF CASE FOR APPELLEE.

People v. O'Brien, 111 N. Y., 1; Detroit v. Detroit Citizens Street R. Co., 184 U. S., 395; Trustees of Southampton v. Jessup, 162 N. Y., 122; Town of Arcata v. Arcata & N. R. R. Co., 92 Cal. 639; People v. Central Union Telephone Co., 192 Ill., 307; Hudson Telephone Co. v. Jersey City, 49 N. J. Law, 304.

IX.

THE REASON FOR THE ATTEMPTED REPEAL.

CITY OF LOUISVILLE, KENTUCKY, *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 197. Argued March 7, 8, 1912.—Decided May 13, 1912.

Under the then constitution of Kentucky, in 1886, the legislature had the sole right to create corporations and grant franchises to use the streets of municipalities; a charter granted by the State, subject to conditions to be imposed by the municipality, became, after the acceptance of the conditions, a grant, not of the municipality but of the State, and one which cannot be impaired by an ordinance made by the municipality.

The new constitution of 1891, conferring upon municipalities the right to grant street franchises, and the later statute repealing special corporate privileges, did not and could not, repeal rights vested in corporations nor relieve them of the burdens imposed by prior charter contract.

The constitution of Kentucky of 1891, while limiting the power to sell franchises in the future, distinctly protected previously granted charter rights under which work had in good faith been begun.

While franchises to be are not transferable without express authority, franchises to have and to hold and to use are contractual and proprietary and can be transferred; and, *held* in this case, that the franchise granted to a telephone company was property, taxable and alienable under the conditions on which it was granted, and, under the contract clause of the Constitution, could not be abrogated as against a transferee whose rights had been recognized by the municipality.

Permitting the transferee of a franchise to act thereunder and expend large sums of money and exacting from it a bond to comply with the conditions of the franchise will operate to estop a municipality from denying that the franchise was transferable and the transferee had succeeded to all the rights of the transferring corporation.

Where the State, and not a municipality, has granted an assignable right in perpetuity to use the streets of that municipality, the grant

is not affected by the status of the city being changed so to give it the greater rights than when the grant was made.

In construing the duration of a telephone franchise, the nature of the system to be operated must be considered as well as the facts that the necessary structures are permanent in nature and require large investments, and that revocation of the franchise at will would operate to nullify it and defeat the purpose of the State to procure the system desired; and so *held* that the legislative grant made prior to the adoption of its present constitution by the State of Kentucky to a telephone company to use the streets of Louisville was one in perpetuity, was assignable and could not be revoked by a subsequent ordinance of the city of Louisville as against the assignee of the original corporation.

On April 3, 1886 (Laws 1885–6, c. 511, p. 1174), the legislature of Kentucky chartered the Ohio Valley Telephone Company, fixing no limit to its corporate existence. Its principal office was to be at Louisville, but the company was empowered to construct and maintain within the State and elsewhere telephone lines, exchanges and systems, and authorized "to purchase or to acquire and dispose of real estate, apparatus, patents, licenses, rights and franchises relating to such business; to borrow money, and to issue and sell bonds and to secure the payment of the same by a mortgage on all the property of the company, and on any of its . . . franchises, easements, rights of way and privileges . . ." In § 5 it was enacted that "The said company may construct, equip and maintain said telephone systems and exchanges, erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the General Council of said city." On August 17, 1886, the city council passed an ordinance which, after reciting this section of the charter, ordained that the act of the legislature above mentioned, so far as it refers to the use of the streets of Louisville, "is hereby ratified and confirmed and the right is hereby granted and confirmed to the said Ohio Valley

Telephone Company, its successors and assigns, to maintain a telephone system, and to erect poles and string wires thereon; . . . and to operate its telephone lines over, along or under any street, avenue, alley or sidewalk in the city of Louisville." There were also provisions in this ordinance regulating the manner of erecting poles and stringing wires in the street, and requiring the company to carry the fire and police wires of the city free of charge, and to give a bond in the sum of $50,000, with surety, to save the city harmless against any damage caused by the opening of any street for telephone purposes. This bond was to be renewed from time to time as required by the city. It was declared that nothing in the ordinance should be construed to give the Ohio Valley Telephone Company, its successors or assigns, any exclusive right in the streets.

The ordinance was accepted, the $50,000 bond was given, and the Ohio Valley Telephone Company erected poles, strung wires, and maintained a telephone exchange in the city of Louisville until January 27, 1900, when it consolidated with the Cumberland Telephone and Telegraph Company. By virtue of the Kentucky statute then of force, a new corporation was created under the name of the Cumberland Telephone and Telegraph Company, and the defendant in error was thereafter vested with all the "property . . . of the constituent companies, without deed or transfer, and bound for their debts and liabilities." The statute, at that time, was silent as to the transfer of "franchises," but in 1902 (Ky. Stat. 1909, § 556) it was amended so as to provide that upon the filing of the certificate the consolidated company should be vested "with all the rights, privileges, franchises, exemptions, property, business, credits, assets and effects of the constituent corporations."

Upon this consolidation on January 27, 1900, the Cumberland Telephone and Telegraph Company entered into

possession of all the property of the Ohio Valley Telephone Company and operated the plant, poles and wires in Louisville until April 7, 1902, when the city council passed an ordinance, that the Cumberland Company should execute a bond for $50,000, as required of the Ohio Valley Telephone Company under the ordinance of August 17, 1886. This was done, and, on June 2, 1902, the council passed a resolution that "the bond of the Cumberland Telephone and Telegraph Company, successor of the Ohio Valley Telephone Company, principal, and the American Bonding Company, of Baltimore city, as surety, be and the same is hereby accepted and approved, and the Ohio Valley Telephone Company, and its sureties, are hereby relieved from all liability under their bond of August 28, 1886."

The Cumberland Company fully complied with the agreement as to carrying the police and fire wires of the city free of charge, greatly enlarged the telephone system in the city, and, at an expense of more than a million dollars, improved the plant and trebled the number of subscribers, although there was in the city another telephone company with a large number of patrons.

In 1908 a difference arose between the city and the company, the city claiming that the company's methods were dictatorial and oppressive, that it rendered poor service at high rates and was guilty of discrimination among its patrons. This the company denied, claiming that its service was good, its rates were low and that what was called discrimination consisted in different rates for different classes of service open on equal terms to all members of the public alike.

No proceedings of any sort were instituted to decide the merits of this controversy, or to secure appropriate relief if, after a hearing, the charges were found to be true. But, apparently with the view of having only one telephone system, an ordinance was submitted to the City Council

of Louisville in 1908 providing for the creation of a comprehensive telephone system, repealing all existing rights and granting a new franchise, which was to be sold to the highest bidder.

The Cumberland Company gave notice that it would rely on its existing contract to use the streets, and would not be a bidder at the proposed sale. Thereupon this ordinance was withdrawn, and another introduced and passed, by which the city, on January 23, 1909, repealed the ordinance of August 17, 1886, under which the Ohio Valley Telephone Company had erected poles, strung wires, and conducted a telephone system.

The Cumberland Company thereupon filed its bill in the United States Circuit Court for the Western District of Kentucky, setting out the facts above outlined, alleging that it was the successor to the Ohio Valley Telephone Company, which, in reliance upon the ordinance of August 17, 1886, had erected a telephone system; that the Cumberland Company, as its successor under the terms of the consolidation act, and in accordance with the contract between the city and the Ohio Valley Telephone Company, carried on the telephone business and does now carry upon its poles and underground conduits the fire alarm and police wires of the city free of charge, which wires have been and now are daily used by the city in the conduct of its police and fire departments; that the Cumberland Company has largely extended and improved the plant, appliances and business, and in doing so has expended $1,700,000, "all of which was done upon the faith of and in reliance upon the said ordinance." It alleged that the repealing ordinance of 1909 impaired the obligation of its contract and deprived the company of its business and property without due process of law, and that, unless enjoined, the city would remove the poles and wires, and destroy the company's business, to its irreparable damage.

A temporary injunction was granted, and the city's demurrer to the bill for want of equity was overruled. The case was referred to a Master to take testimony as to the extent of the discrimination and other matters as to which the city made complaint. On consideration of his report the court said: "We find nothing in the answer of the defendant nor in the large mass of testimony heard on the issues made by the pleadings which should in any way change the views expressed in passing on the demurrer and the motion for a temporary injunction." He thereupon entered a final decree making the injunction permanent. The city appealed, alleging generally that the court erred in overruling the demurrer and in granting the injunction. It specifically alleges that the court erred in holding (1) that the charter granted to the Ohio Valley Telephone Company the right, with the consent of the city, to operate a telephone system which could not be repealed by the city council; (2) that the ordinance of August 17, 1886, constituted a valid and binding contract between the city and the company, which could not be repealed by the council; (3) that upon the consolidation of the Ohio Valley Telephone Company with the Cumberland Telephone and Telegraph Company all the rights of the former under its charter and the ordinance passed to and are now owned by and vested in the Cumberland Telephone and Telegraph Company; and (4) that the ordinance of January 23, 1909, repealing that of August 17, 1886, was void and of no effect.

Mr. Clayton B. Blakey and *Mr. Huston Quin*, with whom *Mr. Joseph S. Lawton* was on the brief, for appellant:

Power to grant a franchise does not exist in a city unless expressly conferred. Nellis on Street Railways, § 23; *Louisville Railway Co.* v. *Louisville*, 8 Bush, 415; *East Tennessee Tel. Co.* v. *Russellville*, 106 Kentucky, 669; *Henderson* v. *Covington*, 14 Bush, 312.

While a valid franchise authorizing a telephone company to occupy the streets of a city entitles such telephone company to an absolute and exclusive appropriation of that space in the streets which is occupied by its telephone poles, *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 97, where a telephone company acquires from the State authority to use the streets of a city by and with the consent of the city, its franchise to use such streets is acquired from the State.

Under such conditions the grant from the municipality is a mere revocable license. Booth on Street Railways, § 10; Nellis on Street Railways, § 20; *Water Co.* v. *Boise City*, 123 Fed. Rep. 232; *Detroit Citizens' R. Co.* v. *Detroit Ry. Co.*, 171 U. S. 48; *S. C.*, 110 Michigan, 384; *Detroit* v. *City Railway Co.*, 56 Fed. Rep. 867; *Wabash Railroad Co.* v. *Defiance*, 167 U. S. 88; *East Ohio Gas Co.* v. *Akron*, 90 N. E. Rep. (Ohio) 40; *Blair* v. *Chicago*, 201 U. S. 400; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 273; *Chicago Ry. Co.* v. *People*, 73 Illinois, 541, 547; *People* v. *Chicago Tel. Co.*, 220 Illinois, 338; *Parkhurst* v. *Salem*, 32 Pac. Rep. (Oregon) 304; *Gas Co.* v. *Parkersburg*, 30 W. Va. 435; *New Haven Co.* v. *Hamersley*, 104 U. S. 1.

A franchise granted by a city silent as to the length of time during which it may be exercised is not a perpetual franchise to occupy the streets unless the city had express authority to grant a perpetual franchise. Cases *supra* and *Linden* v. *LaRue*, 23 How. 435; *Charles River Bridge*, 11 Pet. 419; *Fanning* v. *Gregaire*, 16 How. 528; *Wright* v. *Nagel*, 101 U. S. 791; *Buffalo & J. R. R. Co.* v. *Faulkner*, 103 U. S. 821; *Los Angeles* v. *Water Co.*, 177 U. S. 571; *Mills* v. *St. Clair County*, 8 How. 569.

A grant of a franchise irrevocable and permanent in its nature made by a city without express authority from the legislature to make such grant is void. *Milhau* v. *Sharp*, 27 N. Y. 611; *West End &c. Co.* v. *Atlantic &c. Co.*, 49 Georgia, 151, 155; *New York* v. *Mayor*, 3

Duer, 119; *Blaschko* v. *Wurster*, 156 N. Y. 432; *Ampt.* v. *Cincinnati*, 21 O. Cir. Ct. 300; *Birmingham* v. *St. R. Co.*, 79 Alabama, 465, 473; *Westminster Water Co.* v. *City* (Md., 1904), 56 Atl. Rep. 990; *Central Transportation Co.* v. *Pullman P. C. Co.*, 139 U. S. 24, 60.

A void act of a municipal body will not be validated by the adoption of a new state constitution. *East Tennessee Tel. Co.* v. *Russellville*, 106 Kentucky, 673.

When two corporations consolidate a new corporation comes into existence which is *eo instanti* granted by the State only such portion of the rights and privileges of the constituent corporations as the State at the time had the power to grant. Kentucky Statutes, § 566; *Shields* v. *Ohio*, 95 U. S. 319; *Ferguson* v. *Meredith*, 2 Wall. 25; *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359; *Maine C. R. Co.* v. *Maine*, 96 U. S. 499; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301; *Pennsylvania College Cases*, 13 Wall. 190; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 1; *Wright* v. *Georgia Railroad Co.*, 216 U. S. 422; *Shaw* v. *Covington*, 194 U. S. 596.

All charters, franchises and special privileges granted by the Kentucky legislature subsequent to 1856 are subject to revocation. *Louisville Water Co.* v. *Clark*, 143 U. S. 1; *Covington* v. *Kentucky*, 173 U. S. 331.

All franchises and special privileges granted by the State of Kentucky prior to the adoption of the present constitution and which were revocable remain subject to revocation. Kentucky Constitution, § 3.

Before appellee came into existence the legislature of Kentucky revoked the grant which it had made to the Ohio Valley Telephone Company. Kentucky Statutes, § 573.

The legislature is powerless to revoke any franchise or right which the appellee may have acquired to use the streets of the city of Louisville. Kentucky Constitution, §§ 59 and 60.

The State of Kentucky has delegated to the city of Louisville authority to revoke any franchise which the appellee may have acquired to occupy the streets of the city of Louisville. Kentucky Constitution, §§ 156, 163, 164, 199; Kentucky Statutes, §§ 2742, 2783, 2825.

The legislature had authority to delegate to the city the right to revoke any franchise which the appellee may have acquired to use the streets of the city of Louisville. *City Railway Co.* v. *Sioux City*, 138 U. S. 98; *Mo. Pac. R. R. Co.* v. *Kansas*, 216 U. S. 262.

All special privileges or grants made to corporations prior to the adoption of the present constitution and inconsistent with the provisions of that constitution and the laws made pursuant thereto are now repealed. *Hager* v. *Kentucky Title Co.*, 119 Kentucky, 50; *Pearce* v. *Mason County*, 99 Kentucky, 357; *McTigue* v. *Commonwealth*, 99 Kentucky, 72.

Where a city gives its consent for a telephone company to use its streets without limit as to time the right of such telephone company to continue to use the streets expires when the charter of the city expires. *Blair* v. *Chicago*, 201 U. S. 485; *People* v. *Chicago Tel. Co.*, 220 Illinois, 238; *Parsons* v. *Breed*, 126 Kentucky, 765; *Louisville* v. *Vreeland*, 140 Kentucky, 404.

A city cannot convert a license into a contract by calling it a contract. *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 97; *Wabash R. R. Co.* v. *Defiance*, 167 U. S. 88.

A city may revoke a grant or a license without notice to the grantee and without assigning reasons therefor. *Calder* v. *Michigan*, 218 U. S. 598; *United States* v. *Des Moines Nav. & R. Co.*, 142 U. S. 510.

Discrimination among its patrons gives a city ample cause for revoking the franchise of the telephone company. Wyman on Public Service Corp., chaps. 27, 28; *Delaware & S. Tel. Co.* v. *Kelly*, 160 Fed. Rep. 517; *Missouri* v. *Bell Tel. Co.*, 23 Fed Rep. 541; *Rudd* v. *New York*, 143

U. S. 517; *L. & N.* v. *Central Stock Yard*, 97 S. W. Rep. 778.

Mr. William L. Granbery and *Mr. Alexander Pope Humphrey*, with whom *Mr. Alexander Pope Humphrey, Jr.*, was on the brief, for appellee.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

1. Under the present constitution of Kentucky street franchises cannot be granted for longer than twenty years and then only to the highest bidder, after public advertisement by the city authorities. But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter declared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the General Council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event the franchise granted by the State would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the com-

pany's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council.

2. In 1891 a new constitution was adopted by the State of Kentucky conferring upon municipalities the right to grant street franchises, and later, under the reserve power, a statute was passed repealing all special corporate privileges. It is claimed that in consequence of these laws the street rights granted the Ohio Valley Telephone Company have been withdrawn, or at least made subject to municipal revocation. But we find in the cited sections of the constitution (156, 163, 164 and 199) and the statutes (§§ 573, 2742, 2783 and 2825) nothing which sustains this contention, which, if correct, would lead to the conclusion that all structures theretofore lawfully placed in city streets by water, light, telephone, railway and other public utility companies became nuisances, and as such were removable after September, 1898, to the damage of the community at large and the destruction of property of immense value dedicated to public purposes. The general repeal of all special privileges, referred to in the statute, related to exclusive grants, tax exemptions, monopolies and similar immunities (Ky. Stat. 573; *Covington* v. *Kentucky*, 173 U. S. 231), and not to those corporate powers and property rights needed

and conferred in order to enable the company to perform the duties for which it had been organized. For, while this charter conferred privileges, it also created obligations in favor of the public, and no attempt was made by the general law to repeal the rights which had vested, nor to relieve the company of the burden which had been imposed.

3. The provisions of the constitution and statutes relied on as revoking licenses from municipalities or as conferring power upon cities to repeal grants are in the main prospective and do not in any event support the claim that the General Council can destroy the rights granted the Ohio Valley Telephone Company, whether they be treated as having been acquired under the charter of April 3, 1886, or under the ordinance of August 17, 1886. On the contrary, the constitution of 1891, while limiting for the future the power to sell street franchises, distinctly protected the interests of those public utility companies "whose charters have been heretofore granted, conferring such rights, and work has in good faith been begun thereunder." Inasmuch, therefore, as the charter of the Ohio Valley Telephone Company was granted and as the exchanges were in operation before the adoption of the constitution, that company's rights are expressly preserved by the organic law of the State.

4. The Ohio Valley Company, thus owning the right to use the streets for tele[illegible]ne purposes, was consolidated on January 27, 1900, int[illegible]e Cumberland Telephone and Telegraph Company, the defendant in error, and the latter claims that, as successor, it acquired and now holds these privileges. This is denied by the city on the ground that while the statute, then of force, provided for the transfer of the "property" of the constituent companies, it was not until the amendment of 1902 that provision was made by which their "franchises" could pass to the consolidated company.

It is not necessary to determine whether that amendment

was intended to supply an omission, remove a doubt or to ratify the transfer and use under this and prior mergers. *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 557, 569. For while franchises to be are not transferable without express authority, there are other franchises to have, to hold and to use, which are contractual and proprietary in their nature and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone business. Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property. *Detroit* v. *Detroit Street Ry.*, 184 U. S. 368, 394; *Louisville City Ry.* v. *Louisville*, 71 Kentucky (8 Bush), 534; *West River Bridge* v. *Dix*, 6 How. 507, 534; *Board of Morristown* v. *East Tenn. Tel. Co.*, 115 Fed. Rep. 304, 307. Being property, it was taxable, alienable and transferable, and, as property, passed to the Cumberland Telephone and Telegraph Company under the express provisions of the Kentucky statute, which, as of force in 1900, declared that the consolidated company should be "vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities."

That the street rights, however designated, passed to the Cumberland Company is the natural and obvious construction of the act. The plant and property of a telephone company are useless when dissevered from the streets, and there would, in effect, have been no property out of which to pay the debts or with which to perform the public duties imposed if the street rights of the constituent companies had not been transferred by the

statute to the consolidated company. The constitution (§§ 199 and 200), in providing for the incorporation and consolidation of telephone companies, evidently contemplated, as did the statute, that on this statutory union there should be a transfer of that franchise, right of way or property, which alone gave value to the plant, thereby preserving the investment which had been made, for purposes of private gain and public use. The city itself so construed the general law, and thereupon demanded from the Cumberland Company, as successor of the Ohio Valley Company, the bond for $50,000 called for in the ordinance of August 17, 1886. The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the consolidation statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (*Boone County* v. *Burlington & M. R. R.*, 139 U. S. 684, 693) from claiming that the ordinance was inoperative and it also prevented the Council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company.

5. The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void *ab initio*, or revocable at the will of the General Council, or that it expired in 1893 when (Ky. Stat., 1909, § 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous

decisions are cited, in some of which it appeared that a State had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' Street Railway* v. *Detroit Railway*, 171 U. S. 48, 54; *St. Clair County Turnpike Co.* v. *Illinois*, 96 U. S. 63; *Blair* v. *Chicago*, 201 U. S. 400; 3 Dill., Mun. Corp., §§ 1265–1269.

None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas* v. *Manila*, 220 U. S. 345, 361.

In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixures if they were removable at will of the city and the utility and value of the entire plant

be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau* v. *Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co.* v. *Jersey City*, 49 N. J. L. 303; *Mobile* v. *L. & N. R. R.*, 84 Alabama, 122; *Seattle* v. *Columbia & P. S. R. R.*, 6 Washington, 379, 392; *People* v. *Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R.* v. *Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit* v. *Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that "Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee."

The right to conduct a telephone exchange and to use the streets of the city of Louisville, which had been vested by law in the Cumberland Telephone & Telegraph Company, could not be impaired or forfeited by an ordinance of the General Council; nor had it expired by lapse of

time or under any provision of law when the bill was filed. The Circuit Court properly made the injunction permanent, and its decree is

Affirmed.